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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

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ERRATA

- Page 130, 2d syllabus, line 1, for Presumption read Assumption
- Page 293, 1st syllabus, line 4, for defendant read plaintiff
- Page 320, 2d syllabus, line 7, for lawful nuisance read lawful business

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 12841. Department Two. December 23, 1915.]

JOHN PAPOUTSIKIS, *Appellant*, v. SPOKANE, PORTLAND &
SEATTLE RAILWAY COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—VIOLATION OF RULES—EVIDENCE—SUFFICIENCY. It is a question for the jury to determine whether a section foreman was guilty of negligence in entering a curved cut with a hand car at the rate of twenty miles an hour, under the company's rule to approach with great caution, keeping a lookout for trains, and sending a man ahead if the view is not clear, where it appears that the curve was not a sharp one, and the cut was not so deep as to obscure the view of the smoke of an approaching train, and within the curve there was a view from the center of the track for one thousand feet ahead.

SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The fact that a section man was hurt when a hand car was stopped to avoid collision with a train is not evidence of negligence on the part of the foreman in charge of the car, especially where there was evidence that he jumped off needlessly and was the only man injured; since the jury might have found that he alone was negligent.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be predicated on misconduct of counsel in argument to the jury, in the absence of any exceptions thereto at the time.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 22, 1915, upon the verdict of a jury rendered in favor of the defendant, in an

¹Reported in 153 Pac. 1053.

action for personal injuries sustained by a railroad section employee. Affirmed.

Hibschman & Dill and *C. H. White*, for appellant.

Cannon & Ferris, for respondent.

BAUSMAN, J.—Papoutsikis, riding on a hand-car with a foreman and other workmen, was injured by either falling or jumping off at the approach of an extra train. The latter came on slowly and, before it passed, the foreman had time to pick up Papoutsikis as well as to take the hand-car from the track. The jury having found for defendant, Papoutsikis appeals here an action for personal injuries. Errors are assigned only on the grounds that the verdict is against the law and evidence, and that there was misconduct by opposing counsel.

The accident happened in a curved cut, and such places, the company's rules prescribed, should be approached by hand-cars "with great caution, keeping a look-out for extra trains which will be run without notice . . . Where view is not clear for a distance endangering movement of hand-car, one or more men shall be sent forward."

The first error is based on the Federal liability act abolishing the fellow-servant doctrine. Under that statute, appellant's counsel argue, the injured workman is denied damages only when the negligence is all his own; if there be any in the owner or a fellow servant, the workman must recover something; even if he, too, be negligent, he must get at least nominal damages, the jury being then allowed merely to reduce proportionately his award. Now, the jury having found wholly for the employer, counsel concedes that it must have found the negligence to have been in Papoutsikis alone. This conclusion, however, is asserted to be impossible under the evidence because that disclosed negligence undeniable. They begin by saying that the company's rule was violated. The hand-car in charge of the foreman was running, it is

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Opinion Per BAUSMAN, J.

argued, excessively fast. Evidence there is that it went into the cut at twenty miles an hour, and this speed at such a place seems to the appellant to be of itself a violation of the rule. The jury, satisfactorily instructed on the law, must, in his opinion, have disregarded the facts.

With this we do not agree. The rule was not mandatory. No speed limit was prescribed, no place fixed for the sending forward of men. The curve was by no means a sharp one, the grade almost level, and the cut not so deep as to shut off the smoke of every approaching train. From the middle of the track within the cut, one can see forward more than a thousand feet. It was, then, for the jury to decide whether the foreman was using caution there, for the case is not that of *Tills v. Great Northern R. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434, where the foreman knew a train was soon due, but deliberately raced forward, past bluffs, curves, and timber, to pass it at a convenient place. Thus, even assuming that a violation of the rule might have been here a proximate cause of the injury, the jury had grounds to find that there was no violation.

But it is argued, the man being actually hurt and there being no proof that he himself was at fault, the master's agents must have been. This would mean that, wherever there is a mishap, some one or other must have been negligent. Now, we do not agree with that. Some accidents there are where nobody is negligent, accidents pure and simple. That is perhaps the view the jury took. Moreover, there is testimony that Papoutsikis himself was to blame, for, according to some, he was not thrown by a sudden stoppage, but jumped off in a fright, and whether that fright was an excusable or a foolish alarm was, again, a question for the jury. Nobody else acted thus. Nobody else was hurt. Even that the car was stopped suddenly was disputed. In short, there is a state of facts here from which the jury could conclude Papoutsikis was negligent and that nobody else was.

The second assignment of error is laid in misconduct of counsel for the company in remarks to the jury, but no exceptions appear to have been taken to these remarks when he uttered them. We have held, indeed (*Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486), that, even without concomitant objection, abuses of that kind may be raised in the trial court upon motion for new trial, and thus be saved for consideration here. That, however, is a procedure for aggravated cases and not to be favored. As to the remarks to this jury, we do not deem them grave in their effects, even if improper.

The judgment is affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 12872. Department Two. December 23, 1915.]

ARTHUR EDMONDS, *Appellant*, v. LOUIS ALTMAN *et al.*,
Respondents.¹

USURY—"AGENTS" OF LENDER—PENALTIES—PROFITS OF AGENT—LIABILITY—STATUTES. Where plaintiff purchased and accepted a note from brokers which was made payable directly to himself, without ever having dealt with the makers, the brokers are agents of the plaintiff, either by authority or ratification, within the meaning of Rem. & Bal. Code, § 6255, making a lender liable for penalties for usurious profits of an agent, and making any intermediary the lender's agent when he acts for both parties; and hence he is liable for the penalty of the statute where the brokers, in dealing with the makers, deducted usurious commissions.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Sullivan, J., entered November 25, 1914, in favor of the plaintiff as reduced by certain penalties under the usury statute, in an action on a promissory note, tried to the court. Affirmed.

Peacock & Ludden, for appellant.

John L. Wiley, for respondents.

¹Reported in 153 Pac. 1082.

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Opinion Per BAUSMAN, J.

BAUSMAN, J.—Edmonds, having sued the makers of a promissory note, appeals from a judgment in his favor reduced by certain penalties under our usury statute, Rem. & Bal. Code, § 6255 (P. C. 263 § 13), which, after prescribing these penalties, subjects the lender to usurious profits of an agent and makes any intermediary the lender's agent when he acts for both parties. The lower court held that certain persons, Dickson & Kelliher, were Edmonds' agents, and as this is the sole thing complained of here, we must examine the evidence.

What the Altmans were to pay in their note was \$600, but what they actually received was \$500. Edmonds, for his part, says he turned over the full sum to Dickson & Kelliher, who explain that they kept the difference as an earned commission. Both they and Edmonds deny that they were Edmonds' agents in any degree whatsoever.

It is conceded that the Altmans' dealings were wholly with Dickson & Kelliher, and counsel on both sides have employed much time to prove an agency by previous relations. But there is another and undisputed feature that is conclusive and simple. The Altmans' note does not run to Dickson & Kelliher. Edmonds is not here, though he calls himself a buyer of the note, as an indorsee of it, either actual or pretended. The note, payable directly to him, is a contract between him and the Altmans. Now Edmonds himself had never dealt with the Altmans, so we have a man lending money to people he never saw and disputing the agency of those who inserted his name in it. Somebody or other must have had authority to bring the parties together. Edmonds is not suing on a contract between the Altmans and Dickson & Kelliher, but on a contract between the Altmans and himself. Since he had nothing to do with the Altmans himself, he must have had an agent. He might have refused to take such a note and thus not have become *prima facie* responsible for what those who prepared it might have said or done. But he chose to accept it. From that moment, Dickson & Kelliher were his

agents. On the record here, they are his agents, either by authority or by ratification. Their illegal profit was his. Affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 12927. Department Two. December 23, 1915.]

JOHN T. LANIGAN *et al.*, *Plaintiffs*, v. THOMAS W. MILES,
Appellant, ETTA LANDIS, *Intervener and Respondent*.¹

APPEAL—DECISIONS REVIEWABLE—ORDERS AFFECTING SUBSTANTIAL RIGHTS—FINALITY. An order refusing to strike a complaint in intervention is not appealable as an order affecting a substantial right which either (1) in effect determines the action and prevents final judgment, or (2) discontinues the action, . . . etc., within Rem. & Bal. Code, § 1716, subd. 6; since it does not prevent final judgment or determine or discontinue the action.

Appeal from an order of the superior court for King county, Dykeman, J., entered May 3, 1915, denying a motion to strike a complaint in intervention. Affirmed.

Jones & Riddell, for appellant.

Farrell, Kane & Stratton, for intervener and respondent.

MORRIS, C. J.—Appeal from an order denying a motion to strike a complaint in intervention. Respondent moves to dismiss the appeal upon the ground that such an order is not appealable, and since such motion raises only a question of practice, no reference to the facts is required.

Questions of this character are purely statutory and must be decided by determining whether or not the statute provides for such an appeal. The governing statute is Rem. & Bal. Code, § 1716 (P. C. 81 § 1183), containing seven subdivisions enumerating appealable determinations. It is so clear that the first five and the last of the subdivisions do not aid appellant

¹Reported in 153 Pac. 1081.

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Opinion Per MORRIS, C. J.

that no reference will be made to them. Subdivision 6 provides for an appeal,

“From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial; or (4) sets aside or refuses to affirm an award of arbitration, or refers the cause back to them.”

To our mind, it is clear that this subdivision does not aid appellant. An order denying a motion to strike a complaint in intervention neither (1) determines the proceedings; (2) discontinues the action; (3) grants a new trial; nor (4) sets aside an arbitration or award. Appellant urges that the order complained of affects a “substantial right in a civil action or proceeding,” and hence, falls within the language of subdivision six. This contention overlooks the plain intentment that affecting a “substantial right” is not enough, but the order must go further and determine the proceedings, prevent a final judgment or discontinue the action. The order appealed from is not such an order. The proceedings remain, and the issues are still subject to final judgment, a review of which, on appeal, would determine this or other interlocutory orders. If every ruling of the court which affected a substantial right could be appealed from, the trial of causes would be almost interminable; hence, the statute goes further and demands that such ruling must not only affect a substantial right, but must, in addition, finally determine the proceedings. *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482.

The appeal statute of Iowa is very similar to ours, except that it goes further and provides for an appeal from “an intermediate order involving the merits.” Notwithstanding this extension of the right, it was held in *Schoenhofen Brewing Co. v. Giffey*, 162 Iowa 204, 143 N. W. 1017, that an order denying a motion to vacate an order permitting additional defendants was not appealable. It was likewise held in *Ray*

v. Moore, 19 Ind. 690, 49 S. W. 1088, that an order admitting or refusing to admit additional parties was not appealable because not final in its character. *First Nat. Bank of Leon v. Gill & Co.*, 50 Iowa 425, sustains an appeal of this character, but the ruling is based upon the provisions of the statute permitting appeal from "an intermediate order involving the merits." That an appeal will not lie from orders of this character is stated as a general rule in the absence of special statutory provisions. 3 C. J. §§ 304, 322. Such rule is sustained by the following cases: *Greenawalt v. Natrona Imp. Co.*, 16 Wyo. 226, 92 Pac. 1008; *Jones v. New York Life Ins. Co.*, 11 Utah 401, 40 Pac. 702; *Cobre Grande Copper Co. v. Greene*, 8 Ariz. 98, 68 Pac. 524; *Walker v. National Guaranty Loan & Trust Co.*, 133 Ala. 240, 31 South. 802; *Gammon v. Johnson*, 126 N. C. 64, 35 S. E. 185; *Whitney v. Spearman*, 50 Neb. 617, 70 N. W. 240; *Moore v. Cobe* (Tex. Civ. App.), 156 S. W. 1142.

The judgment is affirmed.

HOLCOMB, MAIN, FULLERTON, and ELLIS, JJ., concur.

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Syllabus.

[No. 13066. Department One. December 23, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. PAUL SCHUMAN,
Appellant.¹

PROSTITUTION—INDICTMENT—SUFFICIENCY—ACCEPTING EARNINGS OF PROSTITUTE. An information charging, in the language of the statute, the accused with wilfully and unlawfully accepting the earnings of one P. W. then and there being a common prostitute, sufficiently charges the offense of accepting the earnings of a prostitute without stating the specific earnings accepted, within the requirements of Rem. & Bal. Code, § 2055, requiring a statement of the acts constituting the offense, in ordinary concise language, so as to enable a person of common understanding to know what was intended.

INDICTMENT AND INFORMATION—"WILFULLY AND UNLAWFULLY." A charge that an offense was committed "wilfully and unlawfully" sufficiently charges knowledge and evil intent.

PROSTITUTION—EVIDENCE—SUFFICIENCY. In a prosecution for accepting the earnings of a prostitute, evidence that the money was paid to defendant, a policeman, solely in consideration of the promise that she be permitted to frequent a certain cafe and solicit without molestation, sufficiently shows that the money was paid to aid, assist or abet the prostitution of the prosecuting witness.

SAME—EVIDENCE—SUFFICIENCY. Evidence that the money was given to the person designated by the defendant sufficiently shows an acceptance by him.

CRIMINAL LAW—EVIDENCE—WEIGHT. Although all the state's witnesses were from the underworld and the principal witness was a thief, their credibility was for the jury.

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES. In a prosecution for accepting the earnings of a prostitute, in which the prosecuting witness testified that, under agreement with the accused, a policeman, she paid to a designated person five dollars a week for protection in soliciting at a certain cafe, evidence of other prostitutes as to identical arrangements with them is not inadmissible as constituting evidence of distinct offenses, since it tends to prove a consistent general system or design evidencing a criminal intent and purpose.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Error in refusing to allow a reputation witness to state what the reputation of the accused was as to being "an honest good citizen" is cured by immediately allowing the witness to state what his reputation was in the community for "good citizenship."

¹Reported in 153 Pac. 1084.

CRIMINAL LAW—EVIDENCE—REPUTATION. Upon the prosecution of a policeman for accepting the earnings of a prostitute, it is not error to refuse to allow a reputation witness to state what the accused's reputation was as to being a "faithful police officer," as the same was not relevant to the nature of the offense charged.

SAME. In a prosecution of a police officer for accepting the earnings of a prostitute in which the veracity of the accused had not been called in question, evidence as to his reputation for truth and veracity is properly excluded.

WITNESSES—CROSS-EXAMINATION—CONCLUSIVENESS—IMPEACHMENT. Where witnesses for the prosecution on cross-examination denied that they were users of cocaine or other drugs, they cannot be impeached by showing that they were, since the matter is collateral.

WITNESSES—CROSS-EXAMINATION—IMPEACHMENT—ADMISSIONS—FOUNDATION. A witness cannot be impeached by showing an admission contrary to the evidence given on cross-examination, where no foundation was laid by directing attention to the time, place, and circumstance of such admission.

SAME—CREDIBILITY—IMPEACHMENT—EXPERT EVIDENCE. Where there was no evidence that witnesses were users of cocaine or other drugs, expert evidence that the use of such drugs would affect their credibility is inadmissible, even if there was a suspicion that they were such users, in the absence of evidence of the mental state or condition either at the time of the transaction or while testifying.

CRIMINAL LAW—TRIAL—COMMENT ON EVIDENCE. It is not an unlawful comment on the evidence for the court, in excluding expert evidence, to remark that there was no evidence in the case on which to base its admission, where such was the fact.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. In a prosecution for accepting the earnings of a prostitute, through payments deposited with the accused's designated agent, in which the evidence showed that the accused was a principal in the matter, it is not prejudicial error that the court gave an instruction authorizing a conviction as an accessory, if it was found that he aided or abetted the agent in receiving the money.

WITNESSES—EXAMINATION—RECALLING—DISCRETION. It is not an abuse of discretion to refuse to recall a witness in order to ask an impeaching question as to a purely collateral matter.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 3, 1915, upon a trial and conviction of accepting the earnings of a prostitute. Affirmed.

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Opinion Per ELLIS, J.

John F. Dore and *Robert Welch*, for appellant.

Alfred H. Lundin and *Joseph A. Barto*, for respondent.

ELLIS, J.—The defendant, Schuman, a patrolman on the police force of the city of Seattle, was accused jointly with one Shea in an information charging that:

“They, said Charles Shea and Paul Schuman, and each of them, in the county of King, state of Washington, on the 8th day of February, 1915, did then and there wilfully, unlawfully and feloniously accept the earnings of one Pearl Williams, she, said Pearl Williams, then and there being a common prostitute;”

He demanded and was accorded a separate trial. The prosecuting witness, Pearl Williams, testified in substance, that she was a common prostitute; that she had been in the habit of frequenting the American Cafe, which was on the appellant's beat, and there soliciting men to accompany her to various hotels and practice prostitution; that about ten months before the trial, the defendant called her into a box in another cafe and informed her that she could not make any money unless he made some also, and that he would have to have five dollars a week; that a night or two afterwards he told her to put the money in an envelope, write on it “Paul,” and leave it at a cigar stand with either one of two men, whom he described as the big blond fellow and the dark fellow, who, as she afterwards learned, were Shea and his partner; that the purpose of paying the money was to enable her to frequent the American Cafe in pursuit of her calling without fear of molestation or arrest by the defendant; that, pursuant to this agreement, she left \$5 at the cigar stand each week for some weeks; that the last time she left money for the defendant was on February 8, 1915, the date charged in the information. The defendant denied these things *in toto*, and there was much evidence tending to discredit the woman's story. There was also much evidence tending to corroborate it. The evidence, so far as necessary, will be discussed in considering the several assignments of error.

The jury found the defendant guilty. From the judgment of conviction and sentence, he appeals.

The appellant claims: (1) That the information was insufficient to charge a crime; (2) That the evidence was insufficient to sustain the verdict; (3) That evidence as to other offenses was improperly admitted; (4) That evidence as to appellant's character for truth, honesty and faithful official conduct was improperly rejected; (5) That expert testimony as to the effect of the habitual use of cocaine upon the user's veracity was improperly excluded; (6) That the court improperly commented upon the evidence in the presence of the jury; (7) That the court refused to give a proper instruction which was requested; (8) That the court gave an improper instruction; (9) That the court abused its discretion in refusing permission to recall a witness in order to lay the foundation for certain impeaching evidence.

I. It is first urged that the information is insufficient in that it impinges the mandate of Rem. & Bal. Code, § 2055 (P. C. 135 § 1016), which requires a "statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." It is admitted that the information is identical with that upheld by this court in *State v. Columbus*, 74 Wash. 290, 133 Pac. 455; but it is insisted that the *Columbus* case is inconsistent with the rules announced in *State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Dodd*, 84 Wash. 436, 147 Pac. 9; *State v. McFadden*, 48 Wash. 259, 93 Pac. 414, 14 L. R. A. (N. S.) 1140, and *State v. Muller*, 80 Wash. 368, 141 Pac. 910. In the recent case of *State v. Crane*, 88 Wash. 210, 152 Pac. 989, the same argument was made as that here advanced, but we there again sustained an information couched in practically the same terms as that here and in the *Columbus* case. Inasmuch as it is still insistently urged that the *Columbus* case runs counter to the decisions above cited, we deem it expedient, briefly as it may be, to notice those cases.

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In *State v. Gifford, supra*, the information specified the manner of the commission of the crime and was held sufficient. The testimony, however, showed that the appellant was an accessory before the fact—that he acted as the procurer. Since this was not charged, it was held that there was a failure of proof of the crime as charged. Here, however, the proof was that the appellant accepted the earnings of a prostitute by his agent Shea. He was charged as a principal and the proof showed him a principal.

The information in *State v. Dodd, supra*, was the antithesis of that found in the case before us. There the information charged the commission of three separate and distinct acts prohibited by subd. 1 of Rem. & Bal. Code, § 2440 (P. C. 135 § 375). It was held bad under Rem. & Bal. Code, § 2059 (P. C. 135 § 1023), which requires that the information “must charge but one crime, and in one form only.” In the *Columbus* case and in the case here, the crime charged was under subd. 5 of the same § 2440, which also prohibits three distinct acts. The information, however, was just the converse of that in the *Dodd* case. It charged the commission of only one of the acts specified in this subdivision, thus avoiding the specific defect found in the information in the *Dodd* case.

In *State v. McFadden, supra*, the accused was charged with causing the death of a child by counseling the withholding of certain kinds of food, but failed to state what other food he prescribed, though implying that he did give other directions as to food. The distinction between that case and this is self-evident.

It is also insisted that the informations here and in the *Columbus* case were fatally defective in that they failed to state the specific earnings accepted. It is argued that “earnings” is a generic term and that, under the rule stated in *State v. Muller, supra*, the information should have descended to the particular and stated whether money, and if

so, how much money was accepted. The *Muller* case involved a charge of bringing into a dry unit of Island county intoxicating liquors in prohibited quantities. As pointed out in the opinion, there were both wet and dry units in that county, and the information did not allege into what particular unit the liquor was brought. We held that to charge a crime it should have designated the unit, and that the statute prescribing the essentials of the information in such cases carries that necessary implication. Rem. & Bal. Code, § 6310 (P. C. 267 § 65). The difference from the case here is plain. The statute there involved provides that it shall not be necessary to state in the information the particular kind of liquor, though it is obvious that "intoxicating liquors" is as generic a term as "earnings of a prostitute." We see no reason why we should adopt a more technical rule as to charging the crime here in question than the legislature prescribed for charging the crime there involved.

It is further asserted that the information here failed to charge that the appellant knew that the earnings accepted were the proceeds of prostitution. It does, however, charge that he "wilfully, unlawfully and feloniously" accepted the earnings of a common prostitute. This, of course, means the earnings of a common prostitute as such, not her earnings as a cook, a laundress or a seamstress, as suggested. *State v. Crane, supra*. The words "wilfully and unlawfully" sufficiently charge knowledge and evil intent. *State v. Muller, supra*; *State v. Zenner*, 35 Wash. 249, 77 Pac. 191; *State v. Barker*, 43 Wash. 69, 86 Pac. 387.

The information charges the crime in the language of the statute so far as applicable to the facts, and in words well calculated "to enable a person of common understanding to know what was intended." It is sufficient.

II. It is claimed that the evidence was insufficient to sustain the verdict, in that it failed to show that the money was paid or received with intent to aid, assist or abet the prostitution of the prosecuting witness. The claim is unfounded.

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The evidence, if believed, was sufficient to show that the money was paid solely in consideration of appellant's promise that the woman would be permitted to frequent the American Cafe and there solicit consorts in prostitution without molestation. If this protection was not aiding, assisting and abetting, it is difficult to conceive of conduct short of actual pandering that would be. Equally unfounded is the claim that there was no evidence of an acceptance. The money was paid in the manner and to the person designated by the appellant. The acceptance was as complete as if it had been paid to the appellant in person.

Though the state's witnesses were all from the underworld and its principal witness was shown to be a thief, the credibility of their testimony was for the jury. On that point the verdict is conclusive.

III. Three other women, all confessed prostitutes, were permitted to testify, over appellant's objection, that, at about the time charged in the information and by arrangement with the appellant, they had paid for permission to frequent the same cafe in aid of their calling by leaving money in the same sums and in the same place for the appellant as testified to by the prosecuting witness. It is urged that this was prejudicial error, in that the evidence related to independent offenses. It is, of course, a general rule that evidence of the commission of a separate and distinct crime is inadmissible to aid the conviction of a defendant for the crime charged. There are, however, exceptions to this rule as thoroughly established as the rule itself. Where the purpose is to show a system or general design from which a criminal intent or purpose may be inferred in the commission of the particular act charged, collateral offenses of the same character and perpetrated in the same way, though not otherwise connected, can always be put in evidence as tending to establish the system or design. The logical basis of this exception to the general rule of exclusion is thus admirably expressed by Wharton:

"When the object is to show system, subsequent as well as prior collateral offenses can be put in evidence, and from such system identity or intent can often be shown. The question is one of induction, and the larger the number of consistent facts the more complete the induction is. The time of the collateral facts is immaterial, provided they are close enough together to indicate that they are a part of the system. In order to prove purpose and design, evidence of system is relevant; and in order to prove system, collateral and isolated offenses are admissible from which system may be inferred." 1 Wharton, Criminal Evidence (10th ed.), p. 146, § 39.

This exception has been recognized and adopted as a basis of decision by this court in many cases. *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042; *State v. Craddick*, 61 Wash. 425, 112 Pac. 491; *State v. Downer*, 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514; *State v. Shea*, 78 Wash. 342, 139 Pac. 203. The similarity of the other offenses with that testified to by the prosecuting witness, the identity of the agreement with the appellant under which the money was paid by other prostitutes, and the identity in manner, place and amount of the payments, all had a direct tendency to prove a consistent general system, scheme or design evidencing a criminal intent and purpose. In this phase, the case here cannot be distinguished from the *Shea* case in which a conviction for grafting, through a promise to protect a gambler, was sustained. Holding evidence of other similar acts admissible, we said:

"This evidence falls within the well established exception to the rule excluding evidence as to other criminal acts. It was properly admitted as a circumstance tending to show a scheme, system, or course of conduct implying a guilty intention on the appellant's part in soliciting a like sum from the prosecuting witness, accompanied by a similar promise."

The evidence here in question was properly admitted.

IV. A witness for the defense who had been a member of the Seattle police commission, having testified that he was

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well acquainted with the appellant's reputation, was asked if he knew what his reputation was in the community "for being an honest and good citizen." He answered in the affirmative and the court at first refused to permit him to state what that reputation was. It is claimed that this was error. Assuming that it was, the wrong was at once corrected. The same witness was immediately asked, "Do you know the reputation of the defendant Paul Schuman in this community for good citizenship?" and answered, "Yes, sir." He was then asked, "What is it?" and answered, "It is good." Obviously, the second question covered the first and cured any error committed in the exclusion of the first.

The court also excluded the testimony of this and another witness as to the appellant's reputation "for being a faithful police officer" and "for truth and veracity." This was not error. As to the first question, it is sufficient to observe that the appellant was not charged with malfeasance in office or for grafting as such, both of which are distinct crimes from that of accepting the earnings of a prostitute, with which he was charged. His general reputation as a police officer was, therefore, not in issue. The rule is thus stated by Wharton:

"Again, the proof of good character to be relevant must be confined to the nature of the offense under charge and bear some pertinent analogy and reference to it. For instance, on charge of adultery, it is wholly irrelevant to inquire as to the accused's honesty and integrity; or on a charge of high treason, it would be absurd to elicit evidence tending to show honesty and uprightness in private business." 1 Wharton, Criminal Evidence (10th ed.), p. 241, § 59.

Touching the second question, the record shows that the state had not introduced any evidence impeaching the appellant's character for truth and veracity. A witness may be impeached by showing that he has a bad reputation for truth and veracity, and this may be met by proof that his reputation in that respect is good. But one cannot bolster his own

testimony by showing that his reputation for truth is good until that reputation has been questioned. The oath of compurgators as an independent defense is obsolete. 1 Bouvier, Law Dictionary, p. 577; 3 Blackstone, Commentaries, 341. In the absence of any attack upon his reputation as an officer or upon his character for truth, the evidence of his general good character as a citizen, or as to the particular trait called in question by the charge against him, was all that the appellant had the right to offer. 3 Ency. of Evidence, pp. 20, 21; *State v. Surry*, 23 Wash. 655, 63 Pac. 557. That evidence, as we have seen, was admitted.

V. On cross-examination of the prosecuting witness, she was asked whether she used cocaine or morphine or any drugs. The question was met by a flat denial. The same question was asked of each of the other three women who testified that they had paid money to the appellant for a similar protection to that testified to by the prosecuting witness. All of them denied the use of cocaine or any other drugs, save one, who admitted that it was administered to her upon one occasion while in the hospital undergoing an operation. When the appellant had entered upon his defense, he called certain police officers to prove that the prosecuting witness was a user of cocaine or other deleterious drugs. None of them was able to state the fact of his own knowledge. The appellant offered to prove by one of them that the prosecuting witness had admitted to him that she was a user of cocaine. This was excluded, and we think properly so for two reasons. In the first place, the whole matter was collateral and was first gone into on cross-examination of the prosecuting witness. As said in *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357:

“No rule is better settled than the one that a cross-examining party is concluded by the answer which a witness makes to a question pertaining to a collateral matter. To such answers no contradiction is allowed, even for the purpose of impeaching the witness.”

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See, also, *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057.

In the second place, even viewing the matter as so related to the state's case in chief as to be subject to impeachment though first gone into on cross-examination, no proper foundation was laid for the impeaching question. The prosecuting witness was never asked whether she had at any time made such an admission. It is elementary that admissions are not admissible to impeach a witness whose attention has never been called to the time, place and circumstance of the alleged admission offered in impeachment. *State v. Stone, supra*.

Another police officer testified that he knew that the prosecuting witness and one of the other women were habitual users of cocaine or other drugs. When further questioned, he admitted that he knew this only by hearsay and added, "I never knew." Thereafter the appellant sought to prove by two physicians, as experts, that a person who is a user of cocaine loses the power to distinguish truth from falsehood and that his word is unreliable. The court excluded this testimony, remarking:

"There is no such testimony here yet, to establish that any one of these girls was an habitual user of cocaine. There is testimony of one of the witnesses only that something was said as to one of them using cocaine."

It is strenuously urged that the rejection of this expert testimony was error. We think, however, that the court's ruling was correct. Even conceding that there was evidence sufficient to raise a suspicion that the witnesses in question were users of cocaine, there was no evidence that they were habitual users of that or of any other drug, nor was there any evidence that any of them was under the influence of any such drug at the time of her examination. What we conceive to be the correct rule is thus stated by Wharton:

"Evidence of the use of opium cannot be introduced to impair credit, unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit." 1 Wharton, Criminal Evidence (10th ed.), p. 785, § 384a, and again:

"But habits (*e. g.*, use of narcotics) likely to impair memory cannot be put in evidence. Such proof, aside from other objections, is secondary. Actual decay or derangement may be proved; not habits likely to have such an effect." 1 Wharton, Criminal Evidence (10th ed.), p. 777, § 378.

There is no claim that any of these witnesses was under the influence of drugs when she testified, nor was there any evidence that either of the physicians had examined any of these witnesses for the purpose of determining her mental state as one of decay or derangement as resulting from such use. See, *McDowell v. Preston*, 26 Ga. 528; *Alleman v. Stepp*, 52 Iowa 626, 3 N. W. 636, 35 Am. Rep. 288. The case of *State v. Concannon*, 25 Wash. 327, 65 Pac. 534, is distinguishable on the facts. There the witnesses whose credibility was attacked were not only positively proven to be habitual users of drugs, but were given the drug while on the witness stand in order to sustain them during the examination. That case clearly fell within the rule as stated by Wharton. The same is true of the case of *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442. In that case the witness was not only an admitted user of opium, but admitted he was under the influence of the drug both at the time of the occurrence of which he testified and when he was on the witness stand. We have been cited to no case, and have found none, which would sustain the admission of expert testimony as to the credibility of witnesses where, as here, it was neither admitted nor proven that they were habitual users of drugs, or were under the influence of drugs either at the time of the transaction concerning which they testified or at the time of testifying.

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VI. The claim that the court improperly commented upon the evidence in the presence of the jury is founded upon the court's remark in excluding the expert testimony above referred to. It is urged that this was an improper comment upon the testimony of the police officers. We find no merit in this contention. The remark made was necessary to an intelligent ruling upon the offered testimony. It was in no just sense a comment upon the evidence. *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

VII. Error is assigned on the refusal of the court to instruct the jury to the effect that, if it found from the evidence that any witness used cocaine or other deleterious drugs, then, as a matter of law, the jury should consider that fact in determining the credibility of such witness. This was not error. As we have seen, there was no sufficient foundation for the instruction in the evidence.

VIII. The court instructed the jury that:

"In order to convict, the state must prove beyond a reasonable doubt the following elements: (1) That the girl, Pearl Williams, was a common prostitute, that is, a woman who indulged in promiscuous sexual intercourse with men for money. (2) That at some time on or about February 8, 1915, in this county and state, either the defendant himself accepted from her some money without any lawful consideration therefor, or that the defendant advised, aided and abetted Charles Shea who did accept from her some money without any lawful consideration therefor. (3) That said money had been earned by her in the practice of prostitution."

It is argued that this instruction was erroneous in that it permitted the jury to convict the appellant as an accessory while the information charged him as a principal. In support of this claim, appellant cites *State v. Gifford*, *supra*, *State v. Morgan*, 21 Wash. 355, 58 Pac. 215, and *Everett v. Simmons*, 86 Wash. 276, 150 Pac. 414. Though technically incorrect, this instruction, in view of the evidence, was not prejudicial. If Shea received the money, then, under the evidence, he received it as the appellant's agent and not

otherwise. The appellant was, therefore, guilty as a principal, even if Shea did not know what was in the envelope or what was the consideration for the payment, or that the woman was a prostitute. The instruction, therefore, was more favorable to the appellant than the evidence warranted, since it required the state to establish either that the appellant himself accepted the money or advised, aided and abetted Shea in accepting it. The proof made the appellant the principal and not an accessory before the fact, regardless of Shea's knowledge in the premises. This case, therefore, presents the exact converse of the situation found in the *Gifford*, *Morgan* and *Simmons* cases. In those cases, the accused was charged as a principal and the evidence showed him an accessory. Here, as we have seen, the appellant was charged as a principal and the evidence showed him to be the principal. There was no evidence tending to show that he was a mere accessory. The instructions in the cases referred to, based on an antithetical state of evidence, and hence prejudicial there, could be prejudicial in no way as applied to the evidence here.

IX. Finally, it is urged that the court abused its discretion in refusing to recall the witness Evelyn Sinclair in order to ask, as a foundation for her impeachment, whether she had not threatened to make a "frame up" against appellant. The proposed questions were in no sense connected with the main charge and were purely impeaching in their character. It is the general rule that the recalling of a witness for further cross-examination is a matter largely resting in the discretion of the trial court. Where the proposed question, as here, relates to a matter purely collateral, there is no abuse of discretion in the refusal to recall the witness. Had there been any evidence of a conspiracy among the women, a different case would be presented. The case of *State v. Jones*, 80 Wash. 588, 142 Pac. 35, relied upon by appellant in this connection, is not apposite. There the evidence for which it was desired to recall the witness had a

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direct relation to the crime charged and would have had a direct tendency to negative the guilt of the accused.

We find nothing in the record warranting a reversal. The judgment is affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and MOUNT, JJ., concur.

[No. 12749. Department Two. December 29, 1915.]

T. H. McKAY, *as Trustee etc., Appellant*, v. B. J. GARMAN,
Respondent.¹

CORPORATIONS—STOCKHOLDERS — STOCK SUBSCRIPTIONS — PAYMENT IN MERCHANDISE—LIABILITY TO CREDITORS. Where but ten thousand dollars of the capital stock of a fifteen thousand dollar mercantile corporation was subscribed for, five thousand dollars being held as treasury stock, and the subscribed stock was paid for by the transfer of \$14,600 worth of merchandise, \$10,000 of which was applied on the stock subscriptions of the owner of the merchandise and the other subscribers, members of his family, who gave notes to him for the amount of their subscriptions, the stock subscribed for was fully paid for, and the stockholders are not liable to creditors as upon an unpaid stock subscription.

SAME—COMMENCING BUSINESS—STOCK NOT SUBSCRIBED—LIABILITY OF OFFICERS. An officer and stockholder in a mercantile corporation is not liable to creditors from the mere fact that the company transacted business before the whole of the capital was subscribed, in violation of law, in the absence of an express statute imposing such liability; since only the state can complain thereof.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered November 7, 1914, in favor of the defendant upon stipulated facts, in an action to recover on an unpaid stock subscription. Affirmed.

Raymond J. McMillan and *W. H. Abel*, for appellant.

F. W. Loomis, for respondent.

MORRIS, C. J.—Appellant seeks in this action to recover from respondent \$4,602, upon the theory of liability growing

¹Reported in 153 Pac. 1082.

out of an unpaid stock subscription. Being defeated in the lower court, he appeals.

The facts are stipulated, in substance, as follows:

“That for several years prior to July, 1908, B. J. Garman transacted business as a merchant in the city of Aberdeen, Chehalis county, Washington, where he now resides, and on the 16th day of July, 1908, B. J. Garman and Theresa Garman, his wife, W. D. Garman, brother of B. J. Garman, and Carrie I. Garman, his wife, made, executed and acknowledged articles of incorporation in triplicate, a copy of which is hereto annexed marked “Exhibit A” and made a part hereof, and which were filed in the office of the secretary of state of the state of Washington on the 21st day of July, 1908, and were thereafter duly filed in the office of the auditor of Chehalis county, Washington.

“The stock of merchandise of B. J. Garman at the time of the incorporation of the company was of the inventoried and reasonable value of \$14,602. The only evidence of a subscription to the capital stock of the B. J. Garman Company is the following writing signed by B. J. Garman, Theresa Garman, Carrie I. Garman and W. D. Garman, respectively, which was entered upon the minute books of the company as follows:

“We the undersigned, subscribe to the number of shares of stock of the B. J. Garman Company as set opposite our names.

B. J. Garman.....	33 shares
Theresa Garman	33 shares
Carrie I. Garmen.....	33 shares
W. D. Garman.....	1 share

“Upon the organization of the corporation B. J. Garman turned over to the corporation his stock of merchandise at the reasonable and inventoried value hereinbefore named as full payment of the \$10,000 in stock subscribed for by himself and associates and received upon the books of the corporation a credit for the value of the stock in excess of \$10,000, to wit: \$4,602. There was no other money or property paid on account of the capital stock of the corporation. The said \$4,602 at various times and in various amounts was thereafter paid to the defendant from the funds of the corporation and applied by him to the payment of certain of his merchandise

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indebtedness contracted by him before the corporation was formed. The balance of the unsubscribed capital stock amount to \$5,000 by agreement of the incorporators was to be held as treasury stock.

"It is further stipulated and agreed that B. J. Garman if called as a witness on the part of the plaintiff in this proceeding would testify substantially as follows, which testimony may be considered by the court in determining this action, to wit:

"My name is B. J. Garman. I was president of the B. J. Garman Company, which was in business about two years prior to its bankruptcy and succeeded to me. I sold the B. J. Garman Company the stock of merchandise. I was in business seventeen years before I sold the stock of merchandise to the company. The capital stock of the company was \$15,000, divided into 150 shares of \$100 each. Fifty shares was treasury stock. I owned the whole stock of merchandise and I sold it to the company. The other stockholders in the corporation did not pay me in cash but gave me promissory notes for the amounts of their respective subscriptions. W. D. Garman gave me a note for \$100 and Carrie I. Garman, his wife, a note for \$3,300. These notes were not paid. I got Carrie I. Garman's stock back and surrendered her note. No interest was paid on the notes.

"I and my wife now own all the stock except one share, which my brother, W. D. Garman, owns. Q. How much in cash or merchandise was paid into the B. J. Garman Company in return for the stock of the par value of \$10,000? A. I had \$14,000 and some odd dollars worth of stock. Q. Merchandise? A. Yes, merchandise. Q. That was before the corporation was formed? A. Yes. Q. Then what happened? A. Of course \$10,000 only was paid up; of course, the rest belonged to me. Q. Did you turn into the corporation that \$14,000 worth of merchandise? A. No, I got credit for the \$4,000."

Upon these facts the judgment must be sustained. The only subscription B. J. Garman made to the capital stock was for 33 shares, and his liability as a subscribing stockholder cannot be extended beyond that. The fact that he, at various times, received \$4,602 from the assets of the corporation does not make him liable for its return upon the

theory that this amount represented a balance due upon an unpaid stock subscription.

Appellant lays much stress upon the testimony given by Garman that "I and my wife now own all the stock except one share which my brother W. D. Garman owns." This testimony must be read in the light of the admitted facts, and can be interpreted to mean nothing more than the stock subscribed for and issued in the first instance. The witness clearly had in mind the fact that fifty shares had not been subscribed for when issued, and was regarded as treasury stock.

Not being liable as a stockholder, is he liable because, as an officer of the corporation, he permitted it to commence business before all of its capital stock was subscribed? This question must be answered in the negative, in the absence of an express statute imposing such liability. It was so held in *American Radiator Co. v. Kinnear*, 56 Wash. 210, 105 Pac. 630, 35 L. R. A. (N. S.) 453, where the court, after a review of our material statutes, denies that the mere fact of transacting business before the whole capital stock is subscribed of itself establishes liability of a corporate officer for corporate debts. We there said:

"While there is some conflict of authority on this question, the weight of authority denies individual liability in such cases, holding that the state alone may complain of the violation of its laws."

The *Kinnear* case is amply supported by authority, and must be accepted as a controlling rule in this case.

The judgment is affirmed.

MOUNT, HOLCOMB, MAIN, and ELLIS, JJ., concur.

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[No. 12768. Department Two. December 29, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES LIBBY,
Appellant.¹

LARCENY—EVIDENCE—SUFFICIENCY. A conviction for stealing a calf on the open range is sustained by the evidence where the defendant admitted the killing and butchering of the calf and the taking of the meat and attempted to conceal the fact, stating to the arresting officer that no one would have known about it if he had not appeared so soon, although the accused claimed that it was shot by mistake and that he intended to find and make compensation to the owner.

CRIMINAL LAW—VENUE—EVIDENCE—SUFFICIENCY. The venue in a prosecution for stealing a calf on the open range is sufficiently shown, although no one was asked the direct question whether the crime was committed in the county alleged, where that fact was clearly shown and there could have been no doubt in the minds of the jury.

LARCENY—INFORMATION—VARIANCE. Upon a prosecution for stealing a calf from the open range, of unknown ownership, there is no variance as to ownership from the fact that a witness on cross-examination testified that he thought it belonged to the L.-W. Co., where he stated on redirect that he did not know who it belonged to.

Appeal from a judgment of the superior court for Okanogan county, Chapman, J., entered November 19, 1914, upon a trial and conviction of cattle stealing. Affirmed.

Smith & Gresham, for appellant.

Chas. A. Johnson, for respondent.

MAIN, J.—On November 16, 1914, the defendant was charged by information with the crime of stealing from the open range and appropriating to his own use, "one head of neat cattle, to wit, one calf, the property of another, the true owner of said calf being unknown to said prosecuting attorney." The trial resulted in a verdict of guilty. From the judgment entered upon the verdict and the sentence imposed, this appeal is prosecuted.

¹Reported in 153 Pac. 1058; 155 Pac. 746.

It is first claimed that the evidence is insufficient to sustain a conviction. Testifying in his own behalf, the defendant admitted the killing, butchering, and taking of the meat of the calf to his own home. The evidence also shows that a portion of the carcass had been buried for the purpose of avoiding any suspicion that his neighbors might have. The arresting officer testified that the defendant stated to him that if he had not appeared so soon, all the evidences at the place where the calf was killed would have been obliterated, and nothing would have been known about it; or words to that effect. The appellant, in explanation of his conduct, claimed that the calf had been shot by mistake, believing it to be a deer, and that he intended to seek out the owner and make compensation. Further discussion of the evidence is unnecessary, as it was abundantly sufficient to sustain the conviction. *Croom v. State*, 71 Ala. 14; *Lundy v. State*, 60 Ga. 143; *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968; *Coombes v. State*, 17 Tex. App. 258.

It is suggested that the state failed to prove the venue as laid in the information. No witness was asked the direct question whether the crime was committed in Okanogan county. But the testimony shows clearly that it was there committed, and that there could have been no doubt in the minds of the jury as to the situs of the crime. This is sufficient proof of venue. *State v. Kincaid*, 69 Wash. 273, 124 Pac. 684; *State v. Chin Sam*, 76 Wash. 612, 136 Pac. 1146.

Finally, it is contended, and this seems to be the principal point urged, that there was a variance between the allegations of the information and the proof, in this: That the information alleged ownership in an unknown person; and it is claimed that the evidence shows individual ownership. The information was based upon Rem. & Bal. Code, § 2605, subdivision 4 (P. C. 135 § 703). According to this statute every person who shall steal, unlawfully obtain, or appropriate "from any range or pasture . . . one or more head of neat cattle . . . shall be guilty of grand larceny."

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There is no substantial evidence as to the ownership of the calf which was killed and appropriated.

Upon cross-examination, the arresting officer expressed the opinion, in answer to one question, that the calf belonged to the Little-Wetzel Company. Upon redirect examination, however, he stated positively that he did not know the ownership of the calf. This evidence was obviously not sufficient to establish ownership.

Counsel for the appellant seek to support their argument as to a variance by a quotation from the opinion of the trial court when ruling upon the appellant's motion for a directed verdict. In the quotation set out in the appellant's brief appear these three sentences:

"I think that the court should hold as a matter of law that the ownership has been proven. The ownership has been virtually disclosed. We cannot presume that the state owned the property."

What the court in this connection actually said was:

"I think that the court should not hold as a matter of law that the ownership has been proven. The ownership has not been assuredly disclosed. We cannot presume that the state knew who owned the property."

The language as quoted in the appellant's brief conveys the opposite meaning from that actually used by the court. The taking of such liberties with the record cannot be justified.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

ON PETITION FOR REHEARING.

[Decided February 29, 1916.]

PER CURIAM.—The attorneys for the appellant in this case have filed a petition for rehearing, in which they request that that paragraph in the opinion which calls attention to the misquotation from the record in the appellant's brief be modified. It is not claimed that the statement in the opinion

is incorrect, either in the quotation from the brief or the quotation from the record. But it is claimed that the facts preliminary to the final certification of the statement of facts are such that the attorneys for the appellant are not blamable for the misquotation that appears in the brief.

The facts are these: During the progress of the trial, and shortly after the trial court had made the ruling upon a motion for a directed verdict or to dismiss, the appellant's attorneys requested from the court reporter a copy of the trial court's remarks in ruling upon the motion, and a copy was soon thereafter furnished. In this copy, the remarks of the trial court are made to appear the same as they appear in the appellant's brief. When the statement of facts was prepared and delivered by the court reporter to the appellant's attorneys, that portion covering approximately two pages embodying the court's remarks was the same as now appears in the record. The attorneys for the appellant, upon discovering this fact, removed these two pages and inserted two other pages, giving the court's remarks as they appeared upon the copy which they received from the stenographer during the trial. In this form the statement of facts was served upon the prosecuting attorney. No amendments were proposed, and in this form the statement was first certified.

After the appellant's opening brief was served, and the statement of facts had been filed in this court, the prosecuting attorney made a motion that the statement of facts be stricken, and in the alternative, that the statement of facts be returned to the superior court of Okanogan county and resubmitted to the trial judge for correction and recertification. This motion was submitted without oral argument, upon affidavits of the respective parties, and resulted in the order directing that the statement of facts be returned to the clerk of the superior court of Okanogan county for correction and recertification. The record as recertified gives the remarks of the trial court in ruling upon the motion for

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a directed verdict as stated in the opinion in this case. In other words, the two pages which had been inserted in the statement of facts by the attorneys for the appellant after it was received from the court reporter, and prior to the time it was served upon the prosecuting attorney are eliminated, and in lieu thereof the remarks of the trial court are made to appear in the same form as they appeared when the statement was delivered by the court reporter to the appellant's attorneys.

In the answering brief, the prosecuting attorney called attention to the misquotation in the appellant's opening brief, but did not detail the facts as they appear in the affidavits submitted upon the motion in this court to strike the statement, or in the alternative, to return for correction and recertification. The appellant's attorneys filed no reply brief. The cause upon the merits was not argued orally. The writer of the opinion upon the merits had no knowledge of the motion at the time of the preparation of the opinion, or the record made thereon. The attorneys for the appellant, other than in the affidavits on the motion, had in no manner called attention to the circumstances under which the misquotation in their opening brief occurred. In preparing the opinion upon the merits, the motion to return the statement for correction and recertification, and the affidavits thereon, are wholly irrelevant and immaterial, and would not be examined unless the briefs had called attention to some matter therein that was proper to be considered.

The above statement of the facts is made because the attorneys for the appellant take the position in their petition for a rehearing that the paragraph in the opinion calling attention to the misquotation in the opening brief was unjust and unfair to them.

Petition for rehearing denied.

[No. 12839. Department Two. December 29, 1915.]

WILLIAM JOHNSTON, *Respondent*, v. WARREN SMITH *et al.*,
Appellants.¹

ANIMALS—HIRING—INJURY TO HORSES—DAMAGES. In an action for damages from overworking plaintiff's horses, hired to the defendant, resulting in their disability and loss of use for a stated period of time after their return, it is error, in estimating the damages, to include Sundays, where the plaintiff testified that he did not work his horses on Sunday.

Appeal from a judgment of the superior court for Adams county, Linn, J., entered February 1, 1915, upon findings in favor of the plaintiff, in an action for damages, tried to the court. Modified.

Wm. O. Lewis, for appellants.

G. E. Lovell, for respondent.

MAIN, J.—Some time during the month of July, 1914, the defendant Warren Smith hired from the respondent four head of horses to be worked on a combination harvester and thresh-er during the harvesting season for that year. The compensation for the use of the horses was to be at the rate of seventy-five cents per day for each horse while it was at work. On the 18th day of August, 1914, the plaintiff demanded possession of the horses, and they were returned to him on that day. Thereafter the present action was instituted, the plaintiff claiming that, during the time the horses were in the possession of the defendants, they had been overworked and improperly cared for, and that by reason thereof the plaintiff has been deprived of their use for a number of weeks after they had been returned to him. The cause was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the sum of \$143.25. From this judgment, the defendants have appealed.

No question appears in the case relative to the earnings of the horses during the time they were in the possession of the

¹Reported in 153 Pac. 1056.

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appellants. The principal question is whether the horses were overworked and improperly cared for during the period they were under hire. This is a question of fact. The evidence is conflicting. Upon this conflicting evidence the trial court found in favor of the respondent. A review of the evidence leads to the conclusion that the trial court's finding upon this question should not be disturbed.

It is claimed, however, that the amount of the judgment is too large, in that the respondent was allowed damages at the rate of seventy-five cents per day for each horse during the period of disability, including Sundays. According to the finding of the trial court, one horse was disabled and unfit for work from August 18, 1914, to September 28, 1914; one from August 18, 1914, to October 1, 1914; one from August 18, 1914, to October 27, 1914; and one from August 18, 1914, to September 28, 1914; making a total disability for the four horses of 191 days, including Sundays. Finding the reasonable value of the use of each horse at seventy-five cents per day, the damages amounted to \$143.25, and this is the amount for which judgment was entered.

The respondent, on cross-examination, in answer to a question, stated that he did not work his horses on Sundays. If he did not work his horses on Sunday, there appears to be no reason why he should be given damages for the loss of their use on that day. Whether damages could in any event be recovered for the loss of the use of the horses on Sunday, there is no necessity here to inquire, as, under the respondent's own testimony, he was not entitled to compensation for that day.

The case will be remanded to the superior court with direction to modify the judgment in accordance with the views herein expressed. The costs in this court will be charged to the respondent.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 12809. Department One. December 30, 1915.]

WHITE INVESTMENT COMPANY, *Respondent*, v.

FRANK DEMARCO *et al.*, *Appellants*.¹

VENDOR AND PURCHASER — BREACH — FORFEITURE — WAIVER. The settlement of a suit to forfeit a contract for the sale of land for default in the payment of installments, and the acceptance of back payments due at that time, does not waive the vendor's right to insist upon a forfeiture upon a subsequent default, the vendor at all times having insisted upon a compliance with the terms of the contract.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 24, 1914, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Blaine & Kinne, for appellants.

Robert A. Devers, for respondent.

MOUNT, J.—This action was brought to quiet title to certain lots in an addition to the city of Seattle. On the trial of the case, the court made findings and entered a decree in favor of the plaintiff. The defendants have appealed.

It appears that on September 20, 1912, the appellants entered into a contract with the respondent by which the appellants agreed to purchase the property in question for the sum of \$2,000. The contract recites that \$100 was paid at the time the contract was entered into; \$120 was to be paid on the 15th day of October, 1912; and thereafter \$20 per month was to be paid on the first day of each month until the full purchase price was paid. The contract also provided that time was of the essence of the contract, and in case of failure of the appellants to make the payments agreed upon, that all the payments theretofore made should be forfeited, and the contract terminated.

¹Reported in 153 Pac. 1060.

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After the contract was entered into, and several payments had been made, the appellants defaulted, and an action was brought by the respondent to terminate the contract. Thereupon, by agreement of the parties, the back payments were made and that action was dismissed. Afterwards the appellants were again in default, and after a demand had been made upon them, and a refusal to pay, this action was brought.

The only defense attempted to be made was that, at the time the contract was entered into, as a part of the consideration therefor, the appellants gave to the respondent a quit-claim deed of certain other property, and that the respondent agreed to pay an indebtedness thereon amounting to some \$3,500; that the respondent neglected to pay any part of that sum, and, therefore, had no right to terminate this contract.

The evidence is overwhelming to the effect that the respondent did not enter into an agreement with the appellants to take the piece of property belonging to the appellants, or to pay the liens against it amounting to some \$3,500, or any other sum. That agreement, if any was ever made, was not made with the respondent, or any one for it. The evidence also very clearly shows—in fact it is not disputed—that the appellants were in default in the payments under the contract for the purchase of the lots in question, and that they had refused, after demand, to make any further payments thereon.

The appellants argue in their brief that, because the respondent accepted payments after default had been made, the respondent is not now entitled to hold the appellants strictly to the terms of the contract. But, as we have seen above, the only time the respondent accepted payments in default was after an action had been brought to set aside the contract. That action was settled by agreement by payment of the amount then past due, and the action was then dismissed. After that time, the appellants were again in de-

fault, and refused upon notice to make further payments. This fact takes the case out of the rule contended for by the appellants, that the respondent has waived the terms of the contract by a course of conduct. *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096; *Rose v. Rundall*, 86 Wash. 422, 150 Pac. 614.

The evidence convinces us, as it convinced the trial court, that the respondent at all times insisted upon a compliance with the terms of the contract, and that the appellants were in default and had refused to make further payments under the contract. The respondent, for that reason, was entitled to have the contract set aside, and a decree quieting title.

The judgment must therefore be affirmed.

MORRIS, C. J., CHADWICK, FULLERTON, and ELLIS, JJ., concur.

[No. 12777. Department Two. December 31, 1915.]

JOHN W. DUNN *et al.*, *Respondents*, v. PUGET SOUND
TRACTION, LIGHT & POWER COMPANY,
Appellant.¹

CARRIERS—INJURIES—TAKING ON PASSENGERS—WHO ARE—INSTRUCTIONS. Upon an issue of fact as to whether plaintiff was a passenger upon defendant's street car, it is error to instruct the jury that in law a person becomes a passenger when he approaches a car in such a manner that the conductor, in the exercise of reasonable care, should ascertain that such person intends to board the car.

SAME—INJURIES—TAKING ON PASSENGERS — WHO ARE — QUESTION FOR JURY. Whether plaintiff was a passenger upon defendant's street car is a question of fact for the jury, where she testified that, while the car was waiting to take on passengers, she stepped on the first step before the gates were closed and was in the act of taking the next step when the car started, while the evidence of the defendant tended to show that the entrance gates were closed and the signal to go ahead given and that the car waited for the passing traffic and was started while the conductor was issuing transfers with his back turned to the closed gate.

¹Reported in 153 Pac. 1059.

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TRIAL—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS. An erroneous instruction that a person is a passenger on a street car when he approaches in such a manner that the conductor should ascertain that he intends to board the car is not cured by a subsequent instruction that a person does not become a passenger unless his attempt to board the car is made before the gates are closed; since the inconsistent instructions tend to confuse the jury.

Appeal from a judgment of the superior court for King county, Humphries, J., entered October 28, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger in boarding a street car. Reversed.

James B. Howe and *H. S. Elliott*, for appellant.

Brady & Rummens, for respondents.

MAIN, J.—This is an action for personal injuries, alleged to have been received by the plaintiff Jane A. Dunn on or about January 10, 1914, while in the act of boarding one of the defendant's street cars. The trial of the case resulted in a verdict and judgment in favor of the plaintiffs.

The plaintiffs' evidence was to the effect that, after the defendant's street car came to a stop at Second avenue and Pike street, in the city of Seattle, for the purpose of taking on passengers, and after other passengers had boarded the car and while the gates were still open, Mrs. Dunn got upon the first step of the car and was in the act of putting her foot on the next step, when the car started, and she was thrown to the pavement and sustained the injuries of which she complains.

According to the defendant's evidence, the car had stopped at Second avenue and Pike street, and after some passengers had gotten aboard and others had gotten off, the entrance gates were closed and the motorman was given the signal to go ahead, but that the car stood for a few seconds, probably on account of the passing traffic, and while the conductor was issuing transfers and his back was turned to the closed gate, the car was started; and after it had moved four

or five feet, Mrs. Dunn was observed lying on the pavement approximately seven feet from the car.

In submitting the cause to the jury, the trial court, in at least two instructions, told the jury that in law one becomes a passenger on a street car when he approaches the car in such a way or manner that the conductor in charge of the car, in the exercise of reasonable care, should ascertain that such person intends to board the car. So instructing the jury was error. *Baltimore Traction Co. v. State*, 78 Md. 409, 28 Atl. 397; *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Duchemin v. Boston Elevated R. Co.*, 186 Mass. 353, 71 N. E. 780, 104 Am. St. 580, 66 L. R. A. 980.

While, as stated in 4 R. C. L., p. 1037, it is probably "impossible to give an exact formula prescribing the acts necessary to create the relation of carrier in such cases," yet it is not necessary in this case to attempt to state the exact rule by which in all cases it can be determined whether the relation of carrier and passenger existed or not. If the facts are as testified by the witnesses for the respondents, under all authority Mrs. Dunn was a passenger at the time she received the injury. On the other hand, if the facts are as testified to by the witnesses for the appellant, there is no authority under which she would be a passenger. This conflicting evidence presents a simple question for the jury to determine. The question could easily have been presented in a brief and pointed instruction.

It is true that in other instructions the jury was told that a person attempting to board a street car does not become a passenger unless such attempt is made while the gates are open; and the fact that one partially succeeds in boarding the car after the gates are closed for the purpose of permitting the car to proceed on its way does not make such person a passenger. Under the instructions thus given to the jury, inconsistent rules were stated by which the appellant's liability, if it existed, was to be measured. The giving of

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inconsistent instructions tends to confuse the jury; and the fact that one instruction may correctly state the law as applicable to one theory of the case does not necessarily cure the error caused by an inconsistent and erroneous statement of the law. *Paysse v. Paysse*, 84 Wash. 351, 146 Pac. 840; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331.

The judgment will be reversed, and the cause remanded with direction to the superior court to grant a new trial.

MORRIS, C. J., HOLCOMB, PARKER, and ELLIS, JJ., concur.

[No. 12772. Department Two. January 4, 1916.]

ADDIE M. CONLEY, *Respondent*, v. WILLIAM K. GREENE,
Appellant.¹

HUSBAND AND WIFE—ACTIONS AGAINST WIFE—NECESSARY PARTIES—COMMUNITY PROPERTY—LIEN OF JUDGMENT. A judgment against a wife, sued alone upon a community debt while she was living with her husband, is not a lien upon community real property standing in the name of the husband; in view of Rem. & Bal. Code, §§ 5917, 5918, giving the husband the management and control of the community property, and Id., § 181, providing that, when a married woman is made a party, her husband must be joined, unless the action concerns her separate property or homestead or is between herself and husband, or she is living separate and apart from her husband.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 17, 1914, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Bausman, Oldham & Goodale, for appellant.

Kerr & McCord, for respondent.

PARKER, J.—The plaintiff, Addie M. Conley, seeks to quiet her title to lots one and two of Denny-Fuhrman's addition to

¹Reported in 153 Pac. 1089.

the city of Seattle, as against a claim of judgment lien thereon made by the defendant William K. Greene. Trial in the superior court resulted in a decree in the plaintiff's favor, from which the defendant has appealed to this court.

The decisive facts, as we view the case, are not in dispute. They may be summarized as follows: During all times involved in this controversy, Mr. and Mrs. W. G. King were husband and wife, living together as such in Seattle, and constituting a community under the laws of this state. In September, 1912, this appellant, as plaintiff, in an action commenced and prosecuted in the superior court for King county, entitled "William K. Greene v. Mrs. W. G. King," procured a judgment against Mrs. King for the sum of \$400, upon a loan of money made by William K. Greene to her in September, 1910, as evidenced by a promissory note signed by her alone. At the time of the rendering of that judgment, Mr. and Mrs. King owned, as their community property, the lots here involved, the title thereto being of record in the name of W. G. King. Thereafter, in the year 1914, respondent purchased the lots of Mr. and Mrs. King, paying a valuable consideration therefor, who conveyed the same to her, though with knowledge upon her part of the judgment against Mrs. King and the claim of William K. Greene that such judgment was a lien upon the lots by reason of Mr. and Mrs. King's community ownership thereof at the time of the rendering of that judgment. It is as against the claim of lien under this judgment, made by William K. Greene, that respondent, the grantee of Mr. and Mrs. King, seeks to quiet her title, and in whose favor decree was rendered accordingly in this case.

It is contended by counsel for appellant that the lots are subject to the lien of the judgment rendered against Mrs. King, upon the theory that the judgment was rendered for a community debt of Mr. and Mrs. King. It seems to us, however, that the problem here for solution is, first, as to

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the nature of that judgment, and as to whom it was rendered against. If not rendered against the community nor against the managing agent of the community, this case would, in any event, seem to call for decision in favor of respondent, as it was so decided by the trial court. We have seen that W. G. King was not a party defendant to the action in which that judgment was rendered, neither as an individual nor as the managing agent of the community. We have also seen that Mr. and Mrs. King have at no time lived separate and apart, so as to make her the managing agent of the community for the purpose of prosecuting or defending actions in its name or in its behalf.

By the express terms of Rem. & Bal. Code, §§ 5917 and 5918 (P. C. 95 §§ 27, 29), "the husband shall have the management and control of community personal property" and "has the management and control of the community real property," with no restrictions except those touching the conveyancing and encumbering of community real property. These provisions of themselves seem to render it plain that the community cannot be sued, nor can judgment be rendered against it, without the husband being made a party to such suit, since it is only by the husband being made a party that the community is made a party, except in certain cases otherwise provided for by Rem. & Bal. Code, § 181 (P. C. 81 § 11), which reads:

"When a married woman is a party, her husband must be joined with her, except,—1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; 3. When she is living separate and apart from her husband, she may sue or be sued alone."

This, it seems to us, argues conclusively that the judgment rendered against Mrs. King is not a judgment against the community and does not create any lien against the community property, real or personal.

We are of the opinion that the question of whether the debt contracted by Mrs. King, upon which the judgment was rendered in favor of William K. Greene, was a community debt is of no moment in this case, in view of the fact that neither the community nor W. G. King, as managing agent thereof, was made a party defendant in that action.

Our attention is called to the recent decision of this court in *Fielding v. Ketler*, 86 Wash. 194, 149 Pac. 667, where a debt contracted by the wife was held to be a community debt and the judgment rendered thereon a community judgment. But that decision does not touch the question here involved, since the husband and wife were both made defendants in that case, thereby, of course, resulting in the community being defendant, and the judgment was rendered in terms against the community as well as the individuals composing the community.

It seems quite clear to us that the judgment of the superior court must be affirmed. It is so ordered.

MORRIS, C. J., MAIN, HOLCOMB, and MOUNT, JJ., concur.

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Statement of Case.

[No. 12773. Department One. January 4, 1916.]

SMITH SAND & GRAVEL COMPANY, *Appellant*, v. D. C. CORBIN,
Respondent.¹

APPEAL—REVIEW—GRANT OF NEW TRIAL. Where a new trial is granted without specifying upon which of several grounds it was based, it will be sustained on appeal if correct on any ground.

PLEADINGS—ABANDONMENT OF ONE CAUSE—STRIKING. Where a third cause of action was abandoned at the first trial of the case, it is not error, on a new trial, to strike it out.

APPEAL—DECISION—QUESTIONS DETERMINED—LAW OF CASE. A decision, on appeal from an order granting a new trial for error of law, that error had been committed in the admission of evidence upon a second cause of action because the complaint was insufficient to state a cause of action, is not *obiter dictum* as to the sufficiency of the complaint, but was necessary upon the question of the propriety of granting the new trial, and becomes the law of the case and conclusive on a retrial.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a written contract for the removal of rock definitely provided what work was to be done and at what price, without fixing the time, thereby implying that it must be done within a reasonable time, it is inadmissible, as varying the terms of the contract, to show by parol an oral agreement that such time was to be given as to allow a removal and sale of the rock at a profit; hence a second cause of action pleading such oral agreement as an additional consideration for making the written agreement does not state a cause of action and is properly struck out on motion.

APPEAL—REVIEW—QUESTIONS CONSIDERED—BRIEFS. The supreme court is not limited in its consideration of a case to the points made in the briefs, but may make an independent investigation in order to arrive at a correct result.

PLEADINGS—AMENDMENTS—DEPARTURE. It is not error to refuse to allow an amendment to the complaint at a second trial, to show a breach of the contract not relied upon at the first trial, which introduced a new cause of action and was a departure from plaintiff's theory at the first trial.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 19, 1915, dismissing.

¹Reported in 154 Pac. 150.

sing certain causes of action, after remand on appeal from an order granting a new trial, in an action on contract. Affirmed.

O. C. Moore, for appellant.

Allen, Winston & Allen, for respondent.

MOUNT, J.—This case has been before this court on two former occasions. The first appeal was by the plaintiff from an order granting a new trial. The appeal was first heard by Department One of this court, and the order affirmed. *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472. A rehearing was granted and the cause was presented to the court *En Banc*. The order granting a new trial was again affirmed, the entire court concurring. In the *En Banc* opinion, speaking of the trial court's ruling on the motion for a new trial, we said:

“The court, in ruling orally upon the motion, gave three reasons for granting a new trial; (1) that he had committed error in his instructions to the jury touching the burden of proof; (2) that he had erred in permitting any testimony to be introduced on the second cause of action; (3) that in any event the verdict was against the evidence. The formal order, however, did not state the grounds. Even under our decision antedating this appeal, which was taken prior to the adoption of the rule to that effect, in *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, we are at liberty to examine the whole record, and, if it discloses any ground warranting the granting of a new trial, the order appealed from must be affirmed.

“Such an examination convinces us that the so-called second cause of action failed to state a cause of action. It pleaded an oral agreement, contemporaneous with the written agreement, and sought to put upon this oral agreement a construction which would vary the terms and legal effect of the writing. It is a rule of universal application that a written contract complete in itself, or in so far as it is complete in itself, cannot be contradicted, explained, enlarged, varied or controlled by extrinsic evidence of a different con-

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temporaneous parol agreement." *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

We then held that, because the court at the first trial had committed error in admitting any evidence under the second cause of action, a new trial was properly granted. For a synopsis of the pleadings and of the facts, we refer to the two former opinions.

On the transmission of the remittitur, the defendant moved the trial court to strike from the amended complaint, upon which the first trial was had, the second and third causes of action. The motion was granted, and a judgment was entered dismissing the second and third causes of action. The plaintiff again appeals.

There is grave doubt as to whether the order appealed from is appealable, but inasmuch as it must be affirmed on the merits, we prefer so to dispose of it.

The first claim of error is directed to the striking by the trial court of the second and third causes of action. The third cause of action was abandoned at the former trial. There was obviously no error in striking it. Counsel makes the surprising claim that the sufficiency of the second cause of action was not before the court on the hearing *En Banc*, and that therefore everything said in the opinion, save the final sentence affirming the order granting a new trial, is *obiter dictum*. Several pages of his brief are devoted to the elementary rule that dictum is not decision. It is then argued that the sufficiency of the complaint was not before us, because insufficiency of a complaint to state a cause of action is not made by statute a specific ground for the granting of a new trial. The statute, Rem. & Bal. Code, § 399, subd. 8 (P. C. 81 § 729), however, does provide that a new trial may be granted for "error in law occurring at the trial and excepted to at the time by the party making the application." It is self-evident that the admission of evidence addressed to a pleading which does not state a cause of action, over objection and exception taken, is error in law. We

were, therefore, compelled to pass upon the sufficiency of the second count of the complaint in order to determine whether the trial court had committed error in law by admitting evidence under it. Demonstrably, the determination of the insufficiency of the second cause of action was necessary to the conclusion that the new trial was properly granted. Our decision that it did not state a cause of action, therefore, became thenceforth the law of the case, and a sufficient warrant to the trial court to strike it from the complaint.

Appellant now urges us to reconsider the question of the sufficiency of the second cause of action, insisting that all that was said in the opinion *En Banc* was an inadvertence, and in conflict with the holding of this court in *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470. We find no such conflict. In that case, there was no formal written contract. The writing consisted of an order for structural iron and the letter acknowledging receipt of the order, stating the price, kind of material, manner of shipment and terms of payment, but failing to state the *quantity* of material or the *time* when it was to be delivered. The defendant pleaded, and was permitted to prove, that the plaintiff agreed to ship the iron *within a reasonable time and not to exceed thirty days after the date* of the contract. We said:

“The letter upon its face does not purport to state the whole agreement. . . . Where it appears that only a part of the contract is in writing, the part not in writing may be proved by parol, *in so far as it is not inconsistent with the written portion*. 17 Cyc. 746-7; Wigmore, Evidence, § 2430. It was proper, therefore, for the court to receive oral evidence as to the time when the materials were agreed to be delivered.”

The phrase which we have italicized in the above quotation states an essential qualification in every such case. It marks a plain and elementary distinction between the *Interstate Engineering* case and the case before us. In the case here, there was neither allegation nor offer of proof that any

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definite time was agreed upon as a reasonable time for the removal of the rock. The written contract definitely provided *what work was to be done, and at what price*, but did not provide when it was to be completed. *There being no allegation that any definite time was agreed upon, either orally or otherwise, it became an implied term of the contract that it must be done within a reasonable time.* It follows that the only competent evidence as to time was evidence of what was a reasonable time to do the work of removing the rock, which was the only work contemplated in the written contract. Such evidence was admitted, and we held properly so. But the appellant, as its so-called second cause of action, pleaded an alleged oral agreement which would extend the time of performance beyond the legally implied reasonable time for the removal of all the rock to such time as it might find necessary to crush the rock and sell it at a profit. As we said on the rehearing *En Banc*:

“Such an agreement would change the whole tenor of the written contract. It would extend the time of performance beyond the legally implied reasonable time for the removal of all the rock to such time as the appellant might find necessary to crush the rock and sell it at a profit. This would contradict and change the whole scope and meaning of the written contract touching a stipulation upon which the writing is clear and unambiguous. The written contract was not for a sale of rock, but for the removal of rock; hence no damages could be recovered for a loss of profits upon the rock without first showing that the respondent terminated the contract and reentered before the expiration of a reasonable time for the removal of all the rock; not before the expiration of a reasonable time for crushing and selling of all the rock at a profit. These two things are so widely different that a contract for the one is wholly inconsistent with an agreement for the other.”

If, in the *Interstate Engineering* case, the plaintiff had pleaded an oral agreement that it should have such time to furnish the iron as might be required to purchase it at such price as to make a profit on the written contract to furnish

the iron to the defendant, proof of such a collateral agreement would have been plainly inadmissible. It would have changed the whole tenor of the written agreement to furnish the iron at a given price for a given purpose. It would have had no tendency to prove what was a reasonable time to *furnish the iron*. Furnishing the iron was the definite purpose covered by the writing. The distinction is just this. The rule that the failure to fix a definite time in the writing to do the definite thing provided in the writing to be done will admit parol proof of what is a reasonable time to do *that definite thing*, does not authorize parol proof of what would be a reasonable time to do that thing *and something else not mentioned nor implied in the writing*.

Counsel quotes with emphasis the following from the *En Banc* opinion:

“In the case before us, the appellant, by its so-called second cause of action, did not merely seek to plead facts showing what was a reasonable time for the removal of all the rock. . . . *but sought to set up and substitute for such reasonable time, an oral agreement that the appellant should have such time as would be required to crush and dispose of the rock by sale at a profit as the agreed time for the removal of the rock.*”

He then says that this construction of the second cause of action is not borne out by an inspection of the complaint, because “nowhere in the complaint is it alleged that the time for performance was to be extended for the purpose of enabling appellant to find purchasers or for any other purpose.” He then immediately states that, under the allegations of the second cause of action, he was at the first trial permitted to introduce evidence “respecting the difficulty of finding a market for the crushed rock and of delays in the work consequent thereon.” Further along in the same connection he argues:

“Now, since the oral portion provided that the rock when removed should become the property of the appellant as an additional consideration, then it was proper to inquire and

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introduce evidence to prove under what circumstances and conditions the rock so contracted to be removed could be rendered available and valuable as an additional consideration, and the question of what constituted a 'reasonable time' for performance was to be determined in the light of those conditions as they might be disclosed by the evidence. This line of inquiry was permitted to some extent by the court at the former trial and it was thereby disclosed, as commented upon by this court, that the value of the rock when crushed, likewise the demand therefor, was dependent upon a variable market, which was controlled in turn to a large extent by the business conditions of the city of Spokane and the amount of public work in progress wherein crushed rock might be used as a building material. These things, we repeat, were undoubtedly in the minds of the contracting parties at the time of the execution of the contract, and necessarily constituted the surrounding circumstances and conditions which must be considered in order to arrive at a just conclusion as to the time within which performance was to be completed."

If in this counsel does not construe his own pleading precisely as we construed it in the quotation from our *En Banc* opinion, which he criticises, then his language has no meaning at all. Nothing which we could say could make it plainer than this language of counsel does that the purpose of the second cause of action was to plead, in order to prove as an additional consideration to that named in the writing, a contemporaneous parol agreement contradicting the terms, enlarging the scope, and varying the purpose of the contract as written, and thus, under the guise of proving an additional consideration, engraft on the written agreement new terms and covenants by parol so as to enlarge the time of performance. Counsel cannot in one breath disclaim that purpose for his second cause of action as pleaded, and in the next breath claim that purpose for *the only evidence offered under that pleading*.

Counsel intimates that the question of the sufficiency of the complaint was not raised in the briefs on the former appeal, and complains that the arguments in support of it

“were the exclusive products of the industry of the court.” The point was raised in respondent’s opening brief on the first appeal and was thereafter discussed in the appellant’s reply brief, and again in appellant’s brief on rehearing *En Banc*. Moreover, the trial court discussed the point in his oral ruling on the motion for a new trial. It is simply idle to intimate that the question was not presented in the record.

The statement that the arguments in support of our opinion *En Banc* were the product of the court’s industry is largely true, but furnishes no just ground for criticism. The responsibilities of this court as a court of review are not limited to what the briefs may offer. Many appeals are presented in which the respondent fails to appear and file any brief, but we never treat the appellant’s case as confessed on that account. In such a case, we always make an independent investigation to the extent that our limited time will permit and endeavor to reach a correct result. For an example, see *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917.

Finally, the appellant, though insisting that the second trial should have been had on the pleadings as they stood when the new trial was granted, somewhat inconsistently now claims that the trial court erred in refusing to permit an amendment of the second cause of action. The trial court committed no error in this respect. The purpose of the proposed amendment was to claim a breach of the contract on respondent’s part in failing to pay ninety per cent of the monthly estimates of rocks removed, as provided in the written contract. This was not claimed as a breach in the original amended complaint. To have permitted the amendment would have introduced an entirely new cause of action. Moreover, to now assert this as a reason for the appellant’s delay in removing the rock would be a plain departure from the position taken by appellant in its reply, wherein it is alleged, in substance, that its delay in removing the rock was

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contemplated by a collateral oral agreement that appellant should have such time to remove it as might be necessary to dispose of it to third persons for commercial purposes. To permit such a departure by amendment would be to encourage successive trials on wholly different theories and to entertain appeals in piecemeal. Such a course would lead to a never ending litigation of the same transaction. *Per-rault v. Emporium Department Store Co.*, 83 Wash. 578, 145 Pac. 438, and cases there cited.

Affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ.,
concur.

[No. 12775. Department Two. January 4, 1916.]

EMMA J. MONROE *et al.*, Appellants, v. MICHAEL G. SAMS
et al., Respondents.¹

SPECIFIC PERFORMANCE—PAROL GIFT OF LAND—EVIDENCE—SUFFICIENCY. Since an oral contract for the gift of land between relatives must be proved by clear and convincing evidence, specific performance of an agreement by parents to deed land to a daughter, in case the son-in-law would build and occupy a house thereon, is properly denied, where the testimony is unequivocally conflicting as to whether such an agreement was made by the father and was insufficient to connect the mother therewith.

Appeal by plaintiffs from a judgment of the superior court for Walla Walla county, Mills, J., entered September 14, 1914, awarding damages to plaintiffs, in an action for specific performance, tried to the court. Affirmed.

Rader & Barker, for appellants.

Pedigo & Smith and *Sharpstein & Sharpstein*, for respondents.

MAIN, J.—This is an action for specific performance. The plaintiffs, John W. Monroe and Emma J. Monroe, are hus-

¹Reported in 153 Pac. 1090.

band and wife, and the latter is the daughter of the defendants Michael G. Sams and Amanda R. Sams, his wife.

During the early part of the year 1912, and for some time prior thereto, the plaintiffs resided in the city of Walla Walla, where John W. Monroe was then, and had for some time prior thereto been, engaged in the restaurant business. Michael G. Sams and wife resided upon a farm about six miles distant from the city. During the month of March, 1912, the Monroes moved to the home of Michael G. Sams and wife. Thereafter Monroe erected a house upon a portion of the farm, which, when completed, was occupied by himself and family. After the house had been completed, Monroe made a demand upon Sams for a deed conveying to him twenty-six acres, or one-half of the farm owned and occupied by the defendants. The house thus constructed by Monroe was occupied by himself and family until some time during the latter part of the year 1913. After vacating the premises and removing to Walla Walla, the plaintiffs brought this action for specific performance.

The cause was tried on the 21st day of May, 1914, and was taken under advisement by the trial judge. Thereafter, and before judgment was entered, one N. H. Sams was made a party defendant, and a supplemental complaint was filed against him. Issues were joined upon the supplemental complaint and were subsequently tried. Thereafter a judgment was entered denying to the plaintiffs specific performance, and awarding them damages in the sum of \$899.45. From this judgment, the plaintiffs only appeal.

It will not be necessary to further refer to N. H. Sams, or the issues tried upon the supplemental complaint, as the views we entertain relative to the rights of the parties in the main action are decisive of the controversy.

The appellants, for specific performance, rely upon an oral contract which they claim had been entered into at or prior to the time they moved from Walla Walla to the farm of the respondents. According to the contention of the ap-

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pellants, they were importuned by the respondents to leave the city of Walla Walla and occupy a portion of the farm then occupied by the respondents. The appellants claim that the respondents agreed to convey to Mrs. Monroe one-half, or twenty-six acres of the farm, if they would move thereon and erect a house in which to live. The conveyance was to be upon condition that the land could not be conveyed by the appellants until their youngest child became of age. The fact is undisputed that they did move upon the farm and erect a house, which they occupied for the period mentioned. After returning to Walla Walla, John W. Monroe again engaged in the restaurant business.

The respondents claim that John W. Monroe approached Michael G. Sams sometime during the early part of the year 1912, and before the appellants moved to the farm, and stated that it was necessary for him to get his family away from the city as he could not keep them there, and that he desired to move into the same house occupied by the respondents. This Sams told him was impossible, because the house was not sufficiently large to accommodate two families. Sams finally told him that he might erect a house on a portion of the farm, and move his family there until he could do better.

The evidence introduced on behalf of the appellants tends to support their contention as to the agreement. The evidence introduced on behalf of the respondents tends to support their version of the understanding between the parties. The rule is, that where a contract for the sale of land rests in parol, the evidence of the making of the contract must be clear and convincing, and all its terms must be fully and satisfactorily proved. 36 Cyc. 689; *Logue v. Langan*, 151 Fed. 455; *Norton v. State Bank of Freeport*, 178 Ill. 294, 52 N. E. 1127; *Lich v. Lich*, 81 Iowa 84, 46 N. W. 763; *Stone v. Hill*, 52 W. Va. 63, 43 S. E. 92; *Wolfe v. Bradberry*, 140 Ill. 578, 30 N. E. 665. The rule as stated in the text of 36 Cyc. 689, is:

“Where a contract for the sale of land rests in parol, the evidence of the making of a contract must be clear and convincing, and all its terms must be fully, clearly, and satisfactorily proved, and the terms, as proved, must be certain and definite.”

Where the parties to a controversy are relatives, as in this case, the requisite of clear and convincing evidence to support an oral contract for the gift of land is no less important, since the fact that the parties are relatives may tend to account for the occupation of the land as permissive rather than as the result of a contract. The proof must indicate more than a vague intention to give. 36 Cyc. 691; *Wright v. Wright*, 31 Mich. 380; *Jones v. Tyler*, 6 Mich. 363; *Allen v. Webb*, 64 Ill. 342.

In this case it may be that, under the evidence, the respondents entertained the intention to convey, at some future time to Mrs. Monroe, title to a portion of the fifty-two acre tract. But the question is, did the respondents make an oral contract that they would convey twenty-six acres of land when the appellants should erect a house thereon and occupy the same? Upon this question, the evidence on behalf of the appellants, if uncontradicted, would hardly be sufficient to connect Mrs. Sams with the contract. As to what the arrangement was with Michael G. Sams and the appellants, the evidence is unequivocally conflicting. Without reviewing the testimony in detail, it may be said that, after a careful consideration of all the evidence, we think the appellants have not established by clear and convincing evidence an oral agreement even with Michael G. Sams by which he was to convey to Mrs. Monroe the land in question when the house should be erected and occupied.

Judgment was entered in favor of the appellants, as above indicated, for \$899.45. This included the money actually expended, and \$300 for sixty days' labor performed by John W. Monroe in building the house. Some claim is made that the amount of damages should have been greater. But

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we think the trial court was sufficiently liberal in this respect.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

[No. 12913. Department Two. January 4, 1916.]

ETHYL SUMNER, *Respondent*, v. GRAYS HARBOR RAILWAY &
LIGHT COMPANY, *Appellant*.¹

CARRIERS — INJURIES — SETTING DOWN PASSENGERS — NEGLIGENCE — EVIDENCE — SUFFICIENCY. There is no evidence of negligence to sustain recovery for injuries to a passenger in alighting from a street car, on a foggy night, where, after the destination was announced, she came to the vestibule and directed the conductor's attention to her suitcase, and immediately stepped off the car while it was gently coming to a stop, supposing that it had stopped, there being no sudden jerk, the street surface being smooth and safe and the car stopping within ten or twelve feet; since the announcement of the destination was not an invitation to alight until the car stopped, and under the circumstances the conductor was not negligent in failing to give notice that the car was still in motion.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered April 24, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Reversed.

Bridges & Bruener, for appellant.

F. W. Loomis, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages which she claims as the result of personal injuries caused by the negligence of the defendant's servant while she was alighting from one of its street cars. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff in the sum of \$208.36, from which the defendant

¹Reported in 154 Pac. 126.

has appealed. The principal contention of counsel for appellant is that the trial court erred in denying their motion for directed verdict in appellant's favor, made at the close of the evidence for the plaintiff, and also at the close of all the evidence.

At about nine o'clock on the evening of November 11, 1914, the respondent was a passenger on one of appellant's street cars, in Aberdeen. She was on her way home, expecting to leave the car at Washington street, at which point she usually left the car when returning to her home from the business portion of the city. It will be conducive to accuracy to tell the story of the incidents immediately preceding the accident in respondent's own language. She was asked and answered in her testimony as follows:

"Q. When you got on the Heron street car did you tell the conductor where you wanted to go? A. Not when I got on. Q. Did you later. A. I think when he called Washington street I just nodded my head at him. . . . Q. Always got off at Washington street? A. While I was living in that part of town I always got off at Washington street. . . . Q. How did you know it was your destination? A. He called Washington street. . . . Q. Where was he when he called the street? A. If I remember right, I think he was about in the middle of the car. . . . Q. When did you get up? A. When I thought the car was about where I would get off; slacking up about enough. . . . Q. Did the conductor go out ahead of you or behind you? A. He went out and then I got up and went out after him. Q. Where was the conductor when you went out? A. He was in the vestibule. . . . Q. What direction was he facing? Toward you or facing some other—A. He had turned around to pick up my suitcase, and he would really be facing,—I can't tell the directions in Aberdeen; facing towards the brewery out that door of the car. Q. Was he picking up your suitcase as you came out of the car? A. As I stood in the door. Q. As you came up to the door what direction was he facing? A. Facing me. Q. Did you say anything to him? A. I told him that was my suitcase. Q. Where was the suitcase? A. Setting in

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the vestibule. Q. Where with reference to his position? A. Sitting right at the back up as close to the rear of the car as could be. Q. Sitting behind him or beside him or in front of him? A. I think it would be at the side of him. Q. And then what did you do? A. The last I can remember I went and took hold of the handle on the door to step out, and that is the last I can remember then. Q. Did he say anything to you about the car not having stopped? A. I didn't hear him. Q. Why did you get off the car when you did? A. Well, I thought the car had stopped, and I was supposed to get off when the car stopped. Q. Could you see that it had not stopped? A. No, it had stopped apparently to me. The fog was so thick—I didn't feel any motion of the car. Q. Was the fog any thicker than usual on that night? A. Yes, sir, very thick. . . . Q. You could see just as well as if you had been outdoors all the while? A. Well, I wasn't outside of the car when I last remember. That is, I wasn't out onto the pavement. The last I can remember is taking hold,—just as I reached for the handle of the car and stepped down onto the first step. Q. Did you see anything that night? Could you see the objects on the street or anything that night? A. Not plain. . . . Q. Did you wait at the vestibule for any length of time, for a moment? A. I hesitated there. I thought he would get the suitcase picked up. Q. The car was still in motion at that time? A. It must have been. Q. You knew it was still going? A. Yes, while I was standing in the door. Q. You say that you stepped out and took hold of the handle of the door, was it, or of the steps? A. Just right there as you step out. . . . Q. When did you ask the conductor for your suitcase? A. Just as I stood in the vestibule door. As I went out I looked where it was left and it was gone. Just then I said to him: "That is my suitcase." . . . Q. As the conductor turned around in a southerly direction over towards the brewery to get your grip, you, thinking the car had stopped, stepped off the car? A. I don't know whether I stepped off or fell off. The last I can remember is when I took hold of the handle. . . . Q. And the conductor at that time was just turning around getting the suitcase in the back of the vestibule? A. Yes, sir. . . . Q. You say you don't remember after you stepped off, fell off, or whatever happened that night. You

say it was still in motion? A. It must have been, but I thought it was not. I didn't remember anything until I got in my house."

Other evidence shows that respondent stepped or fell to the ground while the car was moving slowly, and that it thereafter moved some ten or twelve feet before coming to a full stop. It also appears that the car was possibly a few feet beyond the usual stopping place when it came to rest. It does not appear, however, that there was any difference in the surface of the street at any point alongside of the track at or between the usual stopping place of the car and the place where it actually did stop, assuming that it really passed the usual stopping place. So, so far as the surface of the street is concerned, one place was as safe to alight as another within these limits. There were no gates or doors at the sides of the vestibules of the car for the conductor to open or close, as in some cars. There was no jerk or sudden acceleration of speed of the car which might throw one off his balance or furnish the least cause for his falling. The car was gently coming to a stop. There is nothing in the evidence indicating that respondent was not in full possession of all her faculties, both mental and physical. She was of mature years. This version of the facts we think is as favorable to respondent as the evidence will admit of.

It seems clear to us that there is no possible ground of negligence on the part of appellant upon which the respondent can recover, except it might be said that the conductor was negligent in failing to warn her of the fact that the car had not stopped when she stepped off. Manifestly, there was no affirmative act of negligence whatever committed by appellant or any of its servants contributing to respondent's injuries. Counsel for respondent call our attention to a number of decisions holding that it is not contributory negligence as a matter of law on the part of a passenger, when a station or stopping place is announced, for him to get up and proceed to the platform with a view of alighting. These

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decisions are of no aid here. Other decisions render it plain that such an announcement is not of itself an invitation to a passenger to alight before the train or car comes to a full stop. So the fact that the conductor announced Washington street as the stopping place then being approached and that respondent, in response thereto, got up and proceeded to the platform, argues little or nothing here. Such facts do not show an invitation to respondent to alight before the car came to rest, nor do they show that the conductor had any such intent, nor do they argue that the conductor had any reason to believe that the respondent would attempt to alight before the car came to rest. According to the respondent's own testimony, she was standing in the doorway and directed the conductor's attention away from her to her suitcase, and saw him partly turn to pick it up, immediately preceding her stepping off the car. The real question is, conceding all these facts in the light most favorable to respondent's contention, was the conductor negligent in failing to warn respondent that the car was in motion. We think it must be decided, as a matter of law, that he was not negligent in that respect.

Of the decisions of this court relied upon by counsel for respondent, our attention is called to *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, and *Ranous v. Seattle Elec. Co.*, 47 Wash. 544, 92 Pac. 382. In the *Brown* case, the car was standing still when the plaintiff arose to go out, and suddenly, when she was stepping to the ground, the car started, throwing her to the ground and injuring her. In the *Ranous* case, while the plaintiff was getting ready to step off the car, it apparently being about to come to a stop, its speed was suddenly accelerated, and the lurch caused by such acceleration threw plaintiff onto the street. In these cases, therefore, there was manifestly a positive affirmative negligent act on the part of the company contributing to the injuries for which damages were claimed. We have no such condition here.

In *Morris v. Illinois C. R. Co.*, 127 La. 445, 58 South. 698, 31 L. R. A. (N. S.) 629, there were involved conditions similar to those before us. In answering contentions of substantially the same nature as here made, Chief Justice Breaux, speaking for the court, observed:

"The train was still in motion. Plaintiff testified that it was in motion, but that he was not aware of it at the time. The question arises: Did it not devolve upon him to satisfy himself before alighting that the train was standing ready to permit passengers to alight? If a passenger, who has every reasonable opportunity to assure himself that the train is at full stop, fails to make inquiry, he cannot hold others liable for damages in case he alights while it is in motion and is hurt. There were lights at the depot; near the depot there were visible objects, although it was in the night, whereby it was possible to satisfy himself that the train was still moving; besides, the motion of the car is of itself a warning that the train is still moving and has not come to a full stop.

"Plaintiff's position is that there was negligence on the part of the flagman, who should have warned him of the danger and should have notified him not to attempt to alight. Unquestionably, that would have been a very proper act on the part of the flagman. The question is whether the company is liable for the failure of its flagman to thus notify and warn the plaintiff. That is not the trend of the decisions. . . .

"The flagman had seen plaintiff pass him. He was standing behind him on the steps. He, the testimony states, had no reason to infer that plaintiff would seek to alight at that particular time. It happens (it is within common knowledge) that passengers frequently step down to that step while on their way to alight without attempting to step off before the car has stopped. We are not led to infer from the testimony that the flagman had invited the passenger to step off. It is true, as before stated, that at about the time the whistle sounded for Kentwood he announced that the next stop was at that place. There is not in this announcement an invitation to alight before the train has stopped.

"The following is from the text of Thompson on Negligence [vol. 3, 2d ed., § 2845]: 'Ordinarily, a railway car-

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rier of passengers is under no duty to assist adult passengers who are in apparent good health and possession of their faculties to get on and off its vehicles or to find seats for them; but its duty is limited to giving them a reasonable time and opportunity to do so without assistance, and this is especially true where there are no special sources of danger.' ”

In *Armstrong v. Portland R. Co.*, 52 Ore. 437, 97 Pac. 715, a situation quite similar to this was involved. The plaintiff, arising from her seat and going to the platform upon an announcement of the street she expected to alight at, stepped off the car before it came to rest, there being no invitation for her to do so. Holding that there was no negligence upon the part of the conductor, Chief Justice Bean, speaking for the court, observed:

“It clearly and undisputably shows that there was no negligence on the part of defendant, and that plaintiff was injured because she attempted to alight from a moving car, without any necessity or seeming necessity for so doing, and that she was not advised or requested to do so by defendant’s servants. This was negligence of such an obvious character that the court was justified in directing a verdict against her. 3 Thompson, Negligence, § 3013.

“It is argued, however, that defendant is liable because the conductor did not notify plaintiff that the car was still in motion and warn her against the danger of her contemplated act; but the evidence does not show that the conductor knew, or had any reason to believe, that she was intending to get off the car until it had stopped.

“Plaintiff was of mature years and in possession of all her faculties, and we are not advised of any rule of law making it negligence for the conductor of a street car, under such circumstances, not to warn such a person of the danger to be apprehended in alighting from a moving car. The facts do not bring the case within the rule announced in *Smitson v. Southern Pac. Ry. Co.*, 37 Ore. 74, 60 Pac. 907. There the injured party was a passenger on a steam railway. As the train approached her destination it stopped, and she was invited by one of the company’s servants to alight; but, as she was in the act of doing so the train suddenly started, injuring

her. The facts, therefore, are entirely different from those shown in the present case. Here there was no invitation or request to plaintiff, from any employe or agent of defendant, to alight from the car, and they had no reason for supposing or believing that she would attempt to do so, while the car was in motion. There is, therefore, no ground upon which the defendant can be charged with negligence by reason of the failure of the conductor to notify plaintiff that the car was still in motion, or that she was liable to be injured if she attempted to alight before it stopped."

These views find support in *Illinois Central R. Co. v. Massey*, 97 Miss. 794, 53 South. 385, and *Burton v. Wichita R. & Light Co.*, 89 Kan. 611, 132 Pac. 183.

The decision principally relied upon by counsel for respondent, and which probably lends as much support thereto as any in the books, is that of *Blue Grass Traction Co. v. Skillman*, 31 Ky. Law 480, 102 S. W. 809. That case is possibly distinguishable from the one before us in that the conductor could plainly see that the plaintiff was going to get off while the car was in motion. If not so distinguishable, we are inclined to view that decision as not being in harmony with the weight of authority. However, the Kentucky court in the later case of *Louisville R. Co. v. Furnas*, 155 Ky. 470, 159 S. W. 994, expressed views apparently quite in harmony with the decisions we have above noticed.

In *Elwood v. Connecticut R. & Lighting Co.*, 77 Conn. 145, 58 Atl. 751, we have a decision which it may be said is not in harmony with our conclusion here reached. That decision, however, seems to proceed upon the theory that the facts showed an invitation on the part of the conductor to the plaintiff to alight while the car was in motion. In *Cooper v. Georgia, C. & N. R. Co.*, 61 S. C. 345, 39 S. E. 543, we have a condition where there was an acceleration of the speed of the train instead of its coming to a stop, as it was apparently doing at the time the plaintiff stepped off. The facts of that case may also be well construed as an invitation on the part of the railway company's servant to the plaintiff to step off.

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Syllabus.

In *Long v. Red River, T. & S. R. Co.* (Tex. Civ. App.), 85 S. W. 1048, there were also involved facts which might well be construed as an invitation to the plaintiff to get off the moving train.

We are of the opinion that it must be held, as a matter of law, that appellant's conductor was not guilty of negligence in failing to notify respondent that the car was still in motion when she stepped off. The judgment is reversed and the case dismissed.

HOLCOMB, MOUNT, and MAIN, JJ., concur.

[No. 12526. Department Two. January 5, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. J. H. SCOTT
*et al., Respondents.*¹

NAVIGABLE WATERS—LANDS UNDER WATERS—"TIDE LANDS"—DEEDS—LAND CONVEYED. Under the act of 1897, 2 Rem. & Bal. Code, § 6641, defining tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, excepting oyster lands, a state deed of tide lands conveys title only to the line of mean low tide; as the deed is limited by the express terms of the statute.

SAME. Such deed did not convey any title to oyster lands, theretofore deeded by the state for oystering purposes under the provisions of the Callow act, Rem. & Bal. Code, §§ 6806 and 6807.

SAME—TIDE LANDS—DEEDS—"FRONTING" OR "ADJOINING" TIDE LANDS. Under the act of 1911, 3 Rem. & Bal. Code, § 6641, defining tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, excepting oyster reserves and lands in front of certain cities, which act extended tide lands which theretofore stopped at mean low tide, a state deed of tide lands in front of described upland tracts carries title to all tide lands to the line of extreme low tide, save those excepted; hence, it includes tide lands in front of the upland lots beyond intervening oyster lands sold to oyster growers, although it is not "adjoining" the lots by reason of the intervening oyster lands.

¹Reported in 154 Pac. 165.

SAME—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE—“OWNERS OF SECOND-CLASS TIDE LANDS”—STATUTES. Grantees of state tide lands for oystering purposes, in deeds issued under the provisions of the Callow act, Rem. & Bal. Code, §§ 6806 and 6807, do not take fee simple title and are not owners of tide lands “theretofore sold or conveyed,” within the meaning of the act of 1911, 3 Rem. & Bal. Code, § 6641-1, which granted to owners of second-class tide lands “heretofore sold or conveyed” the preference right for ninety days to purchase all tide lands to the line of mean low tide in front of second-class tide lands theretofore sold; a fee simple title being essential to such preference right.

SAME—“TIDE LANDS”—LANDS INCLUDED—STATUTES—CONSTRUCTION. In view of the Callow act, Rem. & Bal. Code, §§ 6808 to 6818, passed for the encouragement and protection of deep-sea oyster culture and making provision for the leasing of lands lying below the line of extreme low tide for deep-sea oyster planting, at a time when the act defining tide lands limited the same to the line of mean low tide and excepted oyster lands, the act of 1911, 3 Rem. & Bal. Code, § 6641-1, redefining tide lands so as to extend the same to the line of extreme low tide, excepting “oyster reserves,” must be construed as intending to adopt, as the line of extreme low tide, the line separating tide lands from land so continuously covered with water that it might be leased for deep-sea oyster culture; in view of the policy of the state to encourage such culture and especially where the question arises in the construction of a state deed of tide lands, which is to be construed, in case of doubt, most strongly against the grantee.

SAME—“TIDE LANDS”—“MEAN LOW TIDE” AND “MEAN LOWER LOW TIDE.” On Puget Sound, where there are two high and two low tides each day, the alternate high and low being unequal; “mean low tide” signifies the average level of the low tides including both the long and short run out; while “mean lower low tide” signifies the mean level of the daily extreme low tides.

SAME—TIDE LANDS — DEEDS — LANDS INCLUDED — “EXTREME LOW TIDE”—EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain findings that lands in front of abutting uplands, known as the “pothole,” and the bed of the channel leading thereto, were above “extreme low tide,” where it appeared from soundings taken by an engineer, upon a proper plan, during short periods in July and the following January, that the bottom of the pothole was from one to seven feet lower than the arbitrary plane adopted by the United States Geodetic Survey and the Department of Commerce as the lowest plane of tide in Puget Sound recognized by that department and on which its tide tables and charts are based, and the engineer criticising such soundings (because not taken over a sufficiently long period of time) admitted that the bottom of the pothole was about

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a foot below extreme low tide and the channel a foot above; especially where witnesses living in the vicinity for a great many years testified that the lowest tides always left from one to two feet of water in the pothole proper and from four to six inches in the channel, leaving nothing exposed save insignificant portions around the border; hence the title to the pothole and channel did not pass under a state deed of all tide lands "in front" of the abutting upland, limited by statute to the line of "extreme low tide."

ADVERSE POSSESSION—COLOR OF TITLE. A deed of state tide lands, limited to extreme low tide, is not color of title to lands beyond the line of extreme low tide, so as to confer title by adverse possession and the payment of taxes for seven years under color of title in good faith.

SAME—AGAINST STATE. Where there is no element of estoppel against the state's assertion of title to state tide lands adversely occupied, adverse possession does not run against the state.

Appeal from a judgment of the superior court for Thurston county, Claypool, J., entered July 27, 1914, upon findings in favor of the defendants, dismissing an action to quiet title, and for an injunction, tried to the court. Reversed.

The Attorney General and R. E. Campbell, Assistant (L. L. Thompson, of counsel), for appellant.

Gordon & Easterday, for respondents.

ELLIS, J.—This is an action by the state of Washington to recover possession of, and quiet title to, a portion of the bed of Puget Sound, commonly known and referred to in the record as the "pothole," and to enjoin the defendants from trespassing thereon. The defendants admit that the state, upon its admission into the Union, acquired title to the pothole by virtue of § 1, art. 17 of the state constitution, whereby the state asserted title to the beds and shores of all navigable waters within its boundaries. They contend, however, that the state conveyed the pothole to them by certain deeds of second-class tide lands, which are pleaded in their answer. The state admits the issuance of the deeds, but denies that they conveyed the pothole or any part of it. The evidence

shows beyond question that the pothole and the channel leading out of it to deep water lie below the line of mean low tide. Between the pothole and the strip of tide lands lying in front of and contiguous to government lots 3 and 4, are situate certain tide land tracts or oyster claims forming a continuous chain, deeded to Jim Simmons, J. A. Gale and J. H. Tobin for oystering purposes. These oyster claims were deeded under the provisions of chapter 25, pp. 39, 40, Laws of 1895, Rem. & Bal. Code, §§ 6806 and 6807 (P. C. 373 §§ 39, 41), commonly known as the Callow act. We shall hereinafter refer to them as the Callow claims. The deeds upon which the defendants rely as conveying to them the pothole are:

First, a deed from the state dated March 18, 1911, conveying to the defendant J. H. Scott "all of the tide lands undisposed of by the state, situate in front of, adjacent to and abutting upon lot 3, section 22, township 19 north, range 3 west." *Second*, a deed from the state dated June 18, 1901, conveying to the defendant J. H. Scott "all that portion of the tide lands of the second-class owned by the state of Washington, situate in front of, adjacent to and abutting upon lot 4, section 22, township 19 north, range 3 west." *Third*, a deed from the state dated June 6, 1911, to both defendants, conveying:

"All tide lands of the second class, owned by the state of Washington, lying between the line of mean low tide and the line of extreme low tide and in front of lots one, two, three and four, section twenty-two, township nineteen north, range three west, W. M., with a total frontage of 81.81 lineal chains, more or less, measured along the meander line, according to a certified copy of the government field notes of the survey thereof on file in the office of the commissioner of public lands at Olympia, Washington.

"Excepting such portions of said tide lands as are included in state oyster reserves, and subject to such right, title or interest as may have been acquired by the purchaser of any part of said lands as tide lands suitable for the

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cultivation of oysters under any deed or contract heretofore issued by the state of Washington."

Much testimony was introduced of experts from observations taken at the pothole and as to general tide conditions on Puget Sound, and testimony of witnesses long acquainted with the pothole as to whether it has ever been entirely uncovered at the lowest tides, all with the view of determining whether in fact the pothole lies below the plane of extreme low tide.

The court found, in substance, the situation of the land as we have outlined it, and that the defendants had, at all times since July, 1900, been in open, notorious, exclusive and peaceable possession of the pothole, paying all taxes thereon since that time; that the land described as the pothole lies above the line of extreme low tide; that the state of Washington does not now, and did not when this action was commenced, own the pothole or any portion thereof, and that it had failed to establish the material allegations of its complaint. Upon these findings and appropriate conclusions of law, the court entered a decree denying to the plaintiff the relief prayed for, and dismissing the action. The plaintiff appeals.

The appellant contends (1) that the deeds upon which the respondents rely conveyed no title to the pothole, in that the pothole is not in front of and adjoining the upland or any tide lands of the second-class owned by the defendants in front of and adjoining the upland; (2) that the defendants acquired no title to the pothole by any of these deeds because the evidence shows that the pothole is below the line or plane of extreme low tide. The first of these contentions presents a question of law; the second, a question of fact.

I. At the time that the first two deeds were initiated by purchase of the tide lands therein described, tide lands were defined by statute as follows:

"Tide Lands: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean

low tide . . . and excepting oyster lands." Laws of 1897, ch. 89, p. 230, § 4; 2 Rem. & Bal. Code, § 6641.

See, also, *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 Pac. 349, 832, 135 Am. St. 1007.

The first deed, though issued on March 18, 1911, was made in pursuance of a purchase by George C. Israel from the state on July 7, 1900, long before the act of 1911, to which we shall hereinafter refer, had extended the outer line of the state's tide lands to the line of extreme low tide. It is clear, therefore, that this deed conveyed only what Israel had purchased, and carried title no further than to the line of mean low tide.

The second deed, of June 18, 1901, likewise carried title only to the line of mean low tide. It was made in pursuance of a purchase long antedating, and itself long antedated, the extension act of 1911. These two deeds are limited by the express terms of the statute defining tide lands, then in force, to lands above the line of mean low tide, and excepting oyster lands. *Pearl Oyster Co. v. Heuston*, *supra*. They did not convey any of the lands theretofore deeded under the Callow act. This court specifically so held in *Scott v. Olympia Oyster Co.*, 63 Wash. 364, 115 Pac. 737.

At the time the third deed above referred to was issued, the outer line of the state's tide lands had been extended. Tide lands were then defined by statute as follows:

"Tide Lands: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line and excepting oyster reserves." Laws of 1911, p. 130, ch. 36, § 1, subd. 2; 3 Rem. & Bal. Code, § 6641.

It is obvious that, but for the exception of lands theretofore deeded, the description in the third deed would have carried title to the line of extreme low tide, wherever that

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may be. It is equally obvious, as it seems to us, that with the exception, it carries title to all of the tide lands to the line of extreme low tide, *save those excepted*. The appellant contends, however, that this deed, when construed in accordance with the law of 1911, pursuant to which it was made, conveyed nothing beyond the intervening Callow grants. The purchase was under the preference right accorded by § 2 of the act of 1911, which provides:

“The prior and preference right to purchase all tide lands of the second class lying between the line of mean low tide and the line of extreme low tide in front of all tide lands of the second class heretofore sold or conveyed by the state of Washington is hereby granted for the period of ninety days from the date this act goes into effect to the purchasers, their grantees or successors in interest of any tide lands of the second class heretofore sold or conveyed by the state of Washington. . . .” Laws of 1911, p. 130, ch. 36, § 2; 3 Rem. & Bal. Code, § 6641-1.

Appellant insists that the words “in front of” contained in this section, mean “adjoining,” quoting in support of that claim from *State ex rel. Lehman v. Bridges*, 24 Wash. 363, 64 Pac. 518, where it is said:

“From a geometrical point of view ‘in front of’ might include everything between the prescribed line and infinity; but, as applied practically to measurements on the surface of the earth, we believe it can only mean immediately in front of,—that is, adjoining.”

It is argued that, under that decision, the third deed above mentioned did not convey to the respondents any lands outside of the Callow claims, in that lands outside of those claims lay *in front of*, that is, *adjoining* the Callow claims, and not in front of or adjoining the tide lands of the respondents lying between the upland and the Callow claims. Construed in relation to its facts, the *Lehman* case does not sustain the appellant’s contention. That case merely holds that lands “in front of” the limits of an incorporated city or town included only such lands as were adjoining and in front of such

city or town on the same side of the channel of navigable water, and that the term was not used in the absolute or geographical sense which would include all tide lands lying between the side lines of the city extended to infinity so as to embrace tide lands on the other side of the channel. Though it defines the words "in front of" as meaning "immediately in front of—that is, adjoining," this definition is plainly intended as a conclusion from what precedes it. So read, it is clearly meant to apply to the whole body of tide lands on the given side of the channel without regard to segregated ownership, that is, all lands in front of and adjoining in the sense of lying on that side of the channel.

We cannot adopt the view of the *Attorney General* that the Callow act claimants are owners of tide lands "theretofore sold and conveyed," within the meaning of the act of 1911, so as to be entitled to the preference right to purchase the tide lands in front of those claims lying between the lines of mean low tide and extreme low tide under that act. Though they had such a right as prevented their claims from passing by the state's tide land deed, and such in fact that the state could not convey their land at all without first declaring a forfeiture of their claims for cause, they did not hold the fee simple title. *Scott v. Olympia Oyster Co.*, *supra*. On principle it would seem that nothing short of a fee simple title could be a sufficient basis for the preference right to purchase in fee simple the frontal tide lands between mean low and extreme low tide. The case of *Bleakley v. Lake Washington Mill Co.*, 65 Wash. 215, 118 Pac. 5, cited by appellant in this connection, goes no further than to hold that land located below the line of high water and above the meander line on the shore of Lake Washington, and hence subject to overflow, when patented by the government prior to statehood and thereafter owned as private property, is not "shore land" within the meaning of the statute, but is to be regarded as upland by force of the government's survey and patent in fee, the ownership of which carries the preference

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right to purchase unpatented shore lands belonging to the state and fronting or abutting upon the patented land; the patented land, though actually overflow land, being by legal convention upland, carried as an incident the preference right of purchase to its owner in fee simple.

We fail to see wherein the case of *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650, also cited by appellant, when confined to its facts, has any bearing on the question before us. That case involved accretions or relictions resulting from the lowering of the waters of Lake Washington, inuring to the abutting owner with an undefined water boundary. As indicated in that case, there is a marked difference in the definition of shore lands and tide lands found in Rem. & Bal. Code, § 6641, as to their outer boundaries, the outer boundary of shore lands being left undefined, while the outer boundary of tide lands was defined first as extending to mean low tide and subsequently, by the act of 1911, to extreme low tide.

II. Impelled, as we are, both by the terms of the third deed and by the statute under which it was made, to hold that it conveyed all tide lands between the lines of mean low tide and extreme low tide in front of those conveyed by the two prior deeds to the respondents, the issue is reduced to the evidential question, is the pothole below the line or plane of extreme low tide? If it is, the third deed did not convey it to the respondents and the title still remains in the state. If it is not, that deed did convey it to the respondents.

Preliminary to a determination of that question, a brief resume of the state's pertinent tide land legislation will be illuminating as to what was intended by the use of the term "extreme low tide" in the statute, ch. 36, Laws of 1911, p. 130 (3 Rem. & Bal. Code, § 6641-1 *et seq.*). The first act relating to the disposition of tide lands, Laws of 1889-90, p. 431, prescribed no outer boundary for the state's tide lands. They were sold by metes and bounds fixed by surveys made by the applicant in each case. The resulting irregularity of

privately owned tracts led to the passage of the act of 1895, Laws 1895, p. 527; 2 Rem. & Bal. Code, § 6641, *supra*, defining tide lands and adopting the line of *mean low tide* as their outer boundary. Thereafter this court in *Pearl Oyster Co. v. Heuston*, *supra*, held that state deeds of tide lands conveyed nothing between the lines of *mean low tide* and *extreme low tide*. This in turn led to the passage of the act of 1911, amending the definition of tide lands by extending the outer line to the line of *extreme low tide*. The original definition of 1895 and as reenacted in 1897 excepted "oyster lands," and the amended definition of 1911 excepted "oyster reserves." By an act of 1899, Laws 1899, p. 272, ch. 136; Rem. & Bal. Code, §§ 6808 to 6818, inclusive, passed for the encouragement and protection of deep-water oyster culture, provision had already been made for the leasing of lands lying below the line of extreme low tide for deep-sea oyster planting.

With this act and the prior definition before it, we must assume that the legislature, in using the term "extreme low tide," in redefining tide lands in the act of 1911, meant to extend the boundary of its tide lands out to the line separating land so continuously covered with water that it might be leased for deep-sea oyster culture from the tide lands of the state. This, as it seems to us, furnishes a practical definition of the term "extreme low tide" as a boundary, and in view of the exception of oyster lands in both definitions of tide lands and of the settled policy of the state to encourage oyster culture, evidenced by the act of 1899, furnishes an impelling reason, where the question whether a given tract lies below or above that line is one of extreme doubt, for resolving the doubt in favor of the state. This view accords also with the rule that grants by a sovereign state are to be construed most strongly against the grantee, which rule is as applicable to tide land grants as to any other. *Pearl Oyster Co. v. Heuston*, *supra*. Indeed, it would seem that this rule should

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be especially applicable where, as here, its observance tends to subserve a settled policy of the state.

A detailed review of the evidence is incompatible with the reasonable compass of an opinion. It is largely technical. We shall attempt no more than to indicate its nature and tendency.

The state sought to show that the pothole lies below the lowest recognized plane of extreme low tide. On Puget Sound there are two high and two low tides occurring in approximately each twenty-four hours. The alternate high and low tides are unequal. There is an extreme daily low tide and an extreme daily high tide. The term *mean low tide* signifies the mean or average level of the low tides, including both the long and the short daily runout. *Mean lower low tide* signifies the mean level of the daily extreme low tides. The *harmonic plane* is the zero adopted by the United States Coast and Geodetic Survey and the Department of Commerce, upon which its tidal tables, charts and maps are based. It is an arbitrary plane and is the lowest plane of the tide in Puget Sound recognized by that department. It is approximately two feet lower than mean lower low tide and approximately four feet lower than mean low tide. The plane of extreme low tide, as established by the United States army engineers through some twenty years of observations at Seattle, is approximately two feet lower than the harmonic plane. The state sought to show that the pothole lies below this plane as fixed by the army engineers.

Edward Dohm, the field engineer of the state's land department, took soundings at the pothole in order to determine its relation to the plane of extreme low tide. The following method was pursued: In July, 1913, he set a gauge on a pile near the mouth and at the east end of the pothole and another at the west end, and took a series of readings covering two days in July and ten days in the following January. From these readings, and from others taken at the same time at Seattle by the United States Coast and Geodetic

Survey, he determined the difference in elevation between his gauge at the pothole and those at Seattle, and taking the average of these differences, adjusted his gauges to the same level as that at Seattle. He found that his gauges at the pothole were set .05 too low. In taking the soundings in the pothole and in the preparation of the map of the pothole showing his soundings, which is in evidence, due allowance was made for this discrepancy, and also for the change of tides during the time of taking the soundings. One man was located at the gauge recording the height of the water, and another man in a boat was at the same time recording the depth of the water at each sounding. The bottom of the pothole and the channel as compared with the line of extreme low tide at the pothole, as determined by the soundings and readings taken by the witness, adopting the line of extreme low tide as shown by the records of the army engineers and indicated upon the map made by the witness, is from one to seven feet below that plane.

The respondents sought to meet this evidence with the testimony of J. L. Clapp, a civil engineer formerly connected with the United States Engineer's Office at Seattle, who testified, in substance, that, in order to determine the depth of water below the plane of extreme low tide, he would have followed the same course as that pursued by Dohm, but that Dohm's deductions were unreliable because his observations did not extend over a sufficient length of time. He testified that, to be accurate, it would be necessary to take a great number of readings over a long period of time. He also testified that, calculating from maps prepared by the United States Coast and Geodetic Survey, the bottom of the pothole is about a foot below the line of extreme low tide, and the bottom of the channel leading out of the pothole is about a foot above the line of extreme low tide. It is thus apparent that the real controverted point in evidence is as to the depth of the channel, since the respondents' own evidence concedes

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that the pothole proper lies a foot below the plane of extreme low tide as fixed by the government engineers.

With due deference to the opinion of the learned trial court, we believe that greater weight should be given to the testimony of the witness Dohm, which is based upon actual measurements, though covering only a short period of time, but admittedly made upon a proper plan, than to estimates of the respondents' witness Clapp. But even conceding that the testimony of these witnesses might be considered as leaving the matter indeterminate, we have in the record the testimony of a considerable number of witnesses, some of whom had lived on the shores of Oyster Bay for a great many years and were familiar with the tide fluctuations in and about the pothole, all of whom testified that they never saw the greater portion, either of the pothole or of the channel leading therefrom, denuded of water during the lowest tides. Their testimony indicates that there was always a depth of from one to two feet of water in the pothole proper, and from four to six inches of water in the channel during low tide. Some of the respondents' witnesses and one of the respondents himself testified to the same effect. To meet this testimony, the respondents introduced evidence to the effect that there are many springs flowing into the pothole from the upland, and sought to deduce therefrom that the water in the pothole during low tide comes from these springs, but the evidence shows that the water flowing out of the pothole during low tide exceeds in volume that flowing in from seepage and springs, and tends strongly to the conclusion that the water in the pothole at the lowest stage of the tide is not seepage from springs but is sea water.

We have examined the evidence with much care. We are satisfied that it strongly preponderates in favor of the view that both the pothole and the channel leading from it lie below the plane of extreme low tide, save certain insignificant portions around the border. We conclude, therefore, that the deed from the state to the respondents, which both

in law and by its terms conveyed nothing below the plane of extreme low tide, conveyed to the respondents neither the bed of the pothole nor of the channel, and that the title thereto still remains in the state.

We find no merit in the claim of the respondents to a title by adverse possession aided by improvements and payment of taxes. If we are correct in our findings on the evidence, it is clear that the respondents have no color of title, and the case therefore falls within the rule of *State v. Sturtevant, supra*, wherein we held that the possession of a mere squatter is insufficient to initiate a title by adverse possession or to start the running of the statute of limitations. We find nothing in the record sufficient to estop the state from asserting title to this land, and it is elementary that adverse possession cannot be made the basis of title as against a sovereign state. *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549. See, also, Rem. & Bal. Code, § 167 (P. C. 81 § 79).

It seems to be conceded that the description contained in the state's complaint is not an absolutely accurate description of the land lying below the line of extreme low tide as determined by the evidence of the state's engineer, Dohm, and as shown upon the map made by him which was introduced in evidence, showing the limits of the land actually below that plane. The judgment is therefore reversed, and the cause is remanded with direction to the trial court to permit the state to recast its description so as to include only those lands falling below the line of extreme low tide as shown upon the map, excluding, however, such parts of those lands as fall within any of the Callow grants, and enter a decree quieting title to the land so described, and in other respects as prayed for in the complaint. If any question is raised as to the correctness of the new description as compared with the map, the court is directed to take evidence and determine therefrom

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whether such new description conforms to the map now in evidence, and from such evidence correct any discrepancy which may be made to appear.

MORRIS, C. J., MAIN, and FULLERTON, JJ., concur.

[No. 12908. Department Two. January 5, 1916.]

A. H. WINTER, *Appellant*, v. GEORGE EBERHARDT *et al.*,
Respondents.¹

APPEAL — REVIEW — FINDINGS. Findings, where the trial court heard and saw the witnesses, will not be disturbed on appeal if the evidence does not preponderate against them.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 29, 1915, upon findings in favor of the defendants, in an action for damages for fraud, tried to the court. Affirmed.

S. S. Langland, for appellant.

Maurice D. Leehey and *Robert M. Jones*, for respondents.

PER CURIAM.—The plaintiff seeks recovery of damages from the defendants, which he claims resulted from false representations made to him by the defendants inducing him to purchase from them certain mining claims. Trial before the superior court without a jury resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed.

No question worthy of serious consideration is here presented other than questions of fact. We have carefully read all of the evidence as presented to us by the abstract thereof made by counsel, and conclude that we would not be warranted in interfering with the conclusions reached by the trial court. The controlling evidence consists almost wholly of oral testi-

¹Reported in 154 Pac. 139.

mony of witnesses given in the presence of the trial court. Viewing it even in cold typewriting, we incline to the view that it preponderates against appellant's contentions. We think it would be unprofitable to discuss the evidence in detail here.

The judgment is affirmed.

[No. 12771. Department One. January 5, 1916.]

GERMAN SAVINGS, BUILDING & LOAN ASSOCIATION,

Respondent, v. MELVIN LEAVENS *et al.*,

Appellants.¹

USURY—CONTRACTS—INSTALLMENT NOTE—PARTIAL PAYMENTS—INTEREST—COMPUTATION. The loan of \$3,377, upon an installment note for \$5,572, to run ten years, and calling for 120 equal monthly payments of \$46.43, is not usurious; since, under the rule for applying partial payments first to the interest then due, and the balance in reduction of the principal, the payments called for amount to \$465.17 less than the sum loaned, with lawful twelve per cent interest thereon, computed monthly in the manner required.

USURY—CONTRACTS—CONSTRUCTION. Upon the question of usury, where a contract is susceptible of two constructions, one lawful and the other unlawful, the former will be adopted.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 24, 1914, in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Edward Judd and *O. E. Sauter*, for appellants.

Edward Von Tobel, for respondent.

MORRIS, C. J.—Suit to foreclose a mortgage securing the payment of a note in the sum of \$5,572. Two defenses were

¹Reported in 153 Pac. 1092.

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interposed; first, that the respondent falsely represented the interest on the loan to be at the rate of six and one-half per cent per annum; and second, that the note was usurious. The lower court sustained the first defense, awarding respondent judgment for \$3,377, the sum loaned, plus interest at six and one-half per cent less payments made, but denied the plea of usury. The appeal is taken from the denial of the second defense.

The only question submitted to us is whether or not the contract is tainted with usury. The material portions of the note are as follows:

“\$5,572.00

Seattle, Wash., June 15, 1909.

“For value received, I promise to pay to the German Savings, Building & Loan Association the sum of Fifty-five hundred seventy-two 00-100 dollars in 120 equal monthly installments of Forty-six and 43-100 dollars. The first installment payable on the 15th day of July, 1909, and one installment on the 15th day of each and every month thereafter until the whole sum is paid. These payments are on account of a loan obtained from said German Savings, Building & Loan Association of the principal sum of thirty-three hundred and seventy-seven dollars with interest, computed upon unpaid monthly balances.”

It will be observed that the amount to be repaid is \$5,572, and the sum loaned is \$3,377. The difference between these two sums—\$2,195—represents the interest to be paid for the use of the money for ten years, the life of the loan. The question then is, Is the payment of \$2,195 as interest upon a loan of \$3,377 for ten years in excess of twelve per cent per annum?

Appellant contends in support of the usury plea that \$2,195 payable as interest amounts to sixty-five per cent of \$3,377, the amount loaned, or six and one-half per cent for ten years, but inasmuch as the borrower begins repaying one month after receiving the loan, and continues such payments in equal amounts and at equal periods until the whole amount

has been repaid, he would have the use of the first installment for only one month, the second installment for only two months, and so on until the last installment, of which he would have the use for the full term of ten years. This would result, it is said, in the borrower having the use of the loan for an average period of five years, which, upon the basis of six and one-half per cent for the whole use for the ten years, would mean a rate of thirteen per cent, and establish the usury. In order to reach this result, appellant proceeds upon the theory that the proportion of the \$46.48 monthly payment to be applied upon the principal and interest never varies, or, using the language of the brief:

"If the gross sum of \$5,572 thus divided consisted of principal and interest in the proportion of 100 to 65, then each one of the smaller payments into which it was divided must necessarily have been composed of principal and interest in the proportion of 100 to 65, so that each installment of \$46.48 contained \$28.14 principal and \$18.29 interest."

If we accept appellants' premise, their conclusion is mathematically correct. The error of the premise is found in assuming that the respective proportion of principal and interest in the monthly payments never varies. The correct rule adopted by this court is found in *Equitable Sav. & Loan Ass'n v. Bowes*, 70 Wash. 169, 126 Pac. 436, where it was held, in considering a like contention upon a like contract, that the true rule in computing monthly payments is to compute the interest for the first month, apply the monthly payment to the same, and if the payment exceeds the interest, the remainder should be applied in payment of the principal, treating the remainder as a new principal; thus decreasing the interest each month while increasing the sum to be applied in payment of the principal. Computing the interest at twelve per cent per annum, since such rate is permissible under the statute, and applying this rule to the note for the first three months for the purpose of illustration (assuming our figures are correct), the result would be:

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First month, principal.....	\$3,377.00
Payment	46.43
Interest	33.77
To be applied on principal.....	12.66
Second month, new principal.....	\$3,364.34
Payment	46.43
Interest	33.64
To be applied on principal.....	12.79
Third month, new principal.....	\$3,351.55
Payment	46.43
Interest	33.51
To be applied on principal.....	12.92

When the last or 120th payment became due, the principal would be \$470.23, the interest \$4.70, and the remainder to be applied on the principal, \$41.73. Under this method, the total amount of interest paid would be \$2,659.10, while the note states the amount of interest to be \$2,195, leaving a balance of \$464.10 according to our computation, or \$465.17 according to the computation of respondent. This slight difference between our computation and that of the respondent is probably accounted for in the carrying out of the decimal.

Appellant makes much of this result saying, in speaking of respondent's computation, "In the course of his computation, \$465.17 of the principal had evaporated, or, more correctly speaking, had been squeezed out to produce the appearance of a false percentage." This sum of \$465.17 is, however, readily and correctly accounted for when we consider that the interest has been computed at twelve per cent per annum in order to ascertain whether or not the legal rate was exceeded. The result proves that the interest is \$465.17 less than twelve per cent, and this amount represents the difference between twelve per cent and the fraction between eleven per cent and twelve per cent.

Counsel for appellant challenges the correctness of the computation relied upon by the court in the *Equitable Sav.*

& *Loan Ass'n* case. We have not attempted to review the calculation to ascertain whether or not it is correct. The only thing of value here to be extracted from that case is the correct rule to be applied, and in applying it we find that the rate here is less than twelve per cent, which determines the point submitted. The rule adopted in this state by the *Equitable Sav. & Loan Ass'n* case, and the one followed here, of applying the partial payments, first to the interest due, and the remainder, if any, to the principal, is the rule in general use throughout the states. *Jones-Downes Co. v. Chandler*, 13 N. M. 501, 85 Pac. 392.

It is not enough for appellant to show that the mathematical problem involved can be correctly solved and establish usury. This contention is disposed of in *Cissna Loan Co. v. Gawley*, 87 Wash. 438, 151 Pac. 792, where it is said:

"The respondents have, however, offered a number of solutions of the mathematical problem involved which lead to a contrary conclusion. But without entering into details, we think the formulas employed in making the calculation inapplicable. The contract of loan is not on its face usurious. It is made to appear so, if it so appears at all, by showing ulterior facts; by the showing that the actual consideration for the contract was a loan or forbearance of money in a sum less than the aggregate sum agreed to be repaid. Ulterior inquiry is thus permissible from the necessities of the case, since otherwise usury would always be concealed in the form of the contract, and the statute forbidding it thereby rendered nugatory. Hence the courts, in determining whether a particular transaction is usurious, disregard the form and look to the substance of the transaction. But in so doing they will not resort to refined theories, either for the purpose of making the transaction usurious, or of relieving it from usury. They will look to the substance of the transaction; they will determine the time the borrower is to have the use of the principal sum loaned, and ascertain whether the interest reserved for such time exceeds the statutory rate."

In determining whether or not a given contract for the payment of money is usurious, it is clearly the rule that, where the contract is susceptible of two constructions, the

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one lawful and the other unlawful, the former will be adopted. *Ayars v. O'Connor*, 45 Wash. 132, 88 Pac. 119; *Lay v. Bouton*, 73 Wash. 372, 131 Pac. 1153. This is on the theory that presumptions of law are in favor of good faith. Men are presumed to intend to keep within the law, and if their contracts can be enforced within the law, the law will presume such was the intent and so consider it. 6 R. C. L. 839.

Finding that the rate of interest involved is less than twelve per cent per annum, our inquiry need go no further. The judgment is affirmed.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 12778. Department Two. January 5, 1916.]

THOMAS ANDERSON, *Respondent*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, *Appellant*.¹

STREET RAILROADS—COLLISION AT CROSSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Recovery for personal injuries, when plaintiff's automobile was hit by a street car, is sustained, where it appears, that, when plaintiff first attempted to cross the street car tracks ahead of the approaching street car, he had ample room and time to do so before the car reached the crossing, but, as he drove on the track, he was prevented from doing so by another auto truck turning in front of him and, had the motorman been alive to the changed condition, he could have prevented the collision; there being nothing to indicate contributory negligence.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 6, 1914, upon findings in favor of the plaintiff, in an action in tort. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant.

E. L. Skeel and *W. M. Whitney*, for respondent.

MORRIS, C. J.—Action for personal injuries growing out of a collision between one of appellant's cars and an auto truck driven by respondent. The cause was tried to the

¹Reported in 154 Pac. 135.

court without a jury, resulting in a judgment for plaintiff, from which this appeal is taken.

The place of the accident was at the intersection of Terry avenue and Howell street, in the city of Seattle. It is clear from the testimony that, when respondent first attempted to cross the street car tracks, there was ample room and time for him to do so before the car would reach the crossing. This fact was assumed by both the motorman and respondent, and each acted accordingly. Just as respondent drove upon the track he was confronted with a new situation, caused by another auto truck going west turning in front of him in an attempt to pass a slow-going milk wagon going in the same direction. Respondent would have passed in front of this milk wagon had it not been for the approach of the other truck, or had the truck remained behind the milk wagon in the relative position it was when first observed by respondent. The sudden change of course of this auto truck prevented respondent from continuing his passage across the tracks, and in order to avoid a collision with it, he stopped his auto with its front wheels resting on the south rail of the inbound car track, in which position the car hit him.

The evidence supports the theory of the lower court that, had the motorman been alive to this changed situation necessitating a change in action, he could have prevented the collision, and not having done so, negligence was established. We find nothing in the case to establish appellant's theory of contributory negligence.

The judgment is affirmed.

HOLCOMB, MAIN, PARKER, and ELLIS, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 12801. Department One. January 5, 1916.]

ARMAND FERCOT, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

INTOXICATING LIQUORS—LICENSES—FORFEITURE—REVIEW. The forfeiture of a city saloon license for misconduct is a matter within the discretion of the city authorities, not reviewable by the courts, and neither the discretion nor the guilt or innocence of the licensee can be tried out in a collateral proceeding.

SAME—LICENSES—FORFEITURE—RECOVERY OF FEE. Upon the revocation of a saloon license for cause, the licensee cannot, in the absence of statute, recover the unearned portion of the license fee, nor be heard to impeach his plea of guilty to a charge of violating the law.

Appeal from a judgment of the superior court for Spokane county, Pendergast, J., entered December 22, 1914, upon the pleadings, dismissing an action to recover the unearned portion of a license fee upon revocation of a liquor license. Affirmed.

F. W. Girand, for appellant.

H. M. Stephens, Ernest E. Sargeant, and Dale D. Drain, for respondent.

CHADWICK, J.—Appellant brought this action to recover a proportionate part of a saloon license, after a forfeiture by the city commission for misconduct in the use of his license and upon his plea of guilty to a charge that he had sold liquor on Sunday.

It is enough to say that this court has held that the forfeiture of a saloon license for misconduct is a matter so entirely within the discretion of the city authorities that the courts will not review their judgment. *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 Pac. 818; *State ex rel. Puyallup v. Superior Court*, 50 Wash. 650, 97 Pac. 778. Having held that a review may not be had directly, it

¹Reported in 154 Pac. 139.

will follow as of course that neither the discretion of the council nor the guilt or innocence of the appellant can be tried out in a collateral proceeding.

This court has also held, and its holding seems to be in line with the decisions of other courts, that, in the absence of a statute or ordinance compelling it to do so, a city is not liable, at the suit of the licensee, for the return of the money paid for a liquor license where it has been revoked or forfeited for any cause which, to the council, seems sufficient. *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81.

The law is such that appellant cannot now be heard to claim, as he attempts to in this case, that the crime, if any, was induced by the agents of the city; that he was not guilty; that he plead guilty on the advice of counsel that the police justice would probably hold with the city, and it would be cheaper for him to do so than to stand upon his plea of not guilty; and that he has, at all times, obeyed the laws of the state and the ordinances of the city.

There was a time for appellant to try these questions. If convicted before the justice, he might have appealed to the superior court.

He has made his own record and is bound by it.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

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[No. 12829. Department One. January 5, 1916.]

A. REMSNIDER, *Respondent*, v. UNION SAVINGS & TRUST
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION — EXTRA HAZARDOUS EMPLOYMENTS — DANGEROUS PLACE — "WORKSHOP." A janitor in an office building, engaged in cleaning the walls of an elevator shaft wherein an elevator was operated by electrical power, is not engaged in "extra hazardous work" within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, §§ 6604-2 and 6604-3, providing compensation for injuries received in employments recognized as "inherently and constantly dangerous" and enumerating certain occupations as such, in which enumeration is included "workshop," defined as a "room or place wherein power-driven machinery is employed;" since the place was not a "workshop" and it is not provided that employment in every place wherein such machinery is used is impressed with an extra hazardous character.

SAME — WORKMEN'S COMPENSATION ACT — EXTRA HAZARDOUS EMPLOYMENTS—STATUTES. The work of a janitor in cleaning the walls of an elevator shaft in an office building is not "extra hazardous" within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, by reason of the clause in § 6604-2, providing that, if there be or arise any extra hazardous occupation or work other than those enumerated, it shall come under the act and its rate of contribution to the accident fund shall, until fixed by legislation, be determined by the industrial insurance department, where such employment has not "come to be, and to be recognized as being, inherently and constantly dangerous" as provided in such section, nor enumerated in any of the schedules of extra hazardous employments of § 6604-3, nor in any of the classifications of § 6604-4, nor classified by the department as extra hazardous nor its rate of contribution fixed as provided in such clause of § 6604-2.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for personal injuries sustained by a janitor, 54 years of age, crushed in an elevator shaft, is not excessive, where the sciatic nerve was injured, resulting in partial paralysis of a leg and foot, there was a small hernia, and injury to the kidneys, and the evidence as to whether the injuries would be permanent was conflicting, making it a question for the jury.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 25, 1915, upon the

¹Reported in 154 Pac. 135.

verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in cleaning an elevator shaft. Affirmed.

Farrell, Kane & Stratton, for appellant.

Clem J. Whittemore and Peters & Powell, for respondent.

ELLIS, J.—Action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as its janitor. The defendant is the owner of an office building known as the Hoge Building, in the city of Seattle. In the building are maintained and operated three elevators or lifts. The plaintiff, as janitor, was directed by the superintendent or head janitor to go into the elevator shaft beneath the elevator cage and scrub down the walls and doors. While he was so employed, the elevator was run down into the shaft, crushing him between the board across the shaft on which he was reclining and the bottom of the cage.

At the trial, defendant's negligence was conceded. The only contested issue of fact was as to the extent and character of the injuries sustained by the plaintiff. The jury returned a verdict in favor of the plaintiff for \$5,000. From the judgment thereon, the defendant appeals. The record sufficiently presents two questions, which we shall consider in their logical order.

The appellant's first claim is that the respondent, while engaged in cleaning the elevator shaft, was a "workman" engaged in "extra hazardous work," within the meaning of the workmen's compensation act, chapter 74, Laws of 1911, p. 345 (3 Rem. & Bal. Code, § 6604-1 *et seq.*), and that the court, therefore, had no jurisdiction of the action. It is argued that the elevator shaft, wherein was operated an elevator driven by electricity and wherein the respondent was working when injured, was such a place as to make the respondent's work extra hazardous within the meaning of §§ 2 and 3 of the act, in that it was a "room or place wherein power-driven

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machinery is employed." The appellant relies upon our decision in *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 311, as decisive of this point. In that case, the deceased was a carpenter, regularly employed as such by a corporation operating a large department store. His duties comprised making shelving, display standards, repairs, additions, alterations and the like about the store. The company maintained a repair shop primarily for the repairing of its delivery wagons and automobiles. In this shop, besides a carpenter bench and carpenter's tools, there were a power lathe, an emery wheel, a grindstone, drills, etc., operated by electricity. The deceased met his death through receiving an electric current while turning on a switch to put in motion the grindstone for the purpose of sharpening a chisel. After a careful analysis of the statute, we held, in substance, that the company conducted, as a department of its business, this shop, which was extra hazardous within the enumeration of § 2 of the act, being a "workshop" as defined in § 3, a ". . . room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control." Our decision was based upon the plain fact that the shop there in question met the definition of a workshop, and that the deceased met his death in attempting to operate the power-driven machinery in connection with his regular employment, that of "carpenter work," which is in § 4 of the act specifically classified as among the extra hazardous works contemplated by the act.

The distinction between the *Wendt* case and the case before us seems clear. If an elevator shaft in an office building is, as appellant argues, a "room or place wherein power-driven machinery is employed," so as to fall within the

meaning of the workmen's compensation act, then it is such because the elevator shaft is a workshop, since the language quoted is employed in § 3 of the act as defining the word "workshop" as used in the enumeration of extra hazardous works found in § 2. The act does not say, nor does it imply, that every place in which power-driven machinery is employed impresses an extra hazardous character on work performed in such a place. It merely employs the circumstance of the presence of power-driven machinery in connection with a number of other things in defining a workshop. If the presence of power-driven machinery is the sole determining factor, then every shaft in which is operated a power-driven elevator or lift is a workshop. Then, also, the operator of the elevator, and every employee of the appellant who in the course of his duties had occasion to enter the elevator to pass from one floor to another, would be employed, for the time being, in a room or place wherein power-driven machinery is employed—hence, in a workshop, and in an extra hazardous work.

Though the respondent was injured in a place where power-driven machinery was employed, it cannot, by the widest stretch of the meaning of the statute, be termed a workshop. Though his regular employment was at times fraught with hazard, as are all employments, it was not one which, to use the language of § 2 of the act, has "come to be, and to be recognized as being, inherently and constantly dangerous." Neither was it connected with any of the occupations enumerated as extra hazardous in § 2, nor is it mentioned in any of the schedules in § 3, or in any of the classifications in § 4. Section 2 of the act closes with the provision that:

"If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4." 3 Rem. & Bal. Code, § 6604-2.

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But neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extra hazardous, nor has any rate of contribution been fixed as provided in the clause quoted.

In the recent case of *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608, after another careful analysis of the statute, we held that one who was employed in operating a passenger or freight elevator or lift in a mercantile establishment was not engaged in an extra hazardous employment within the meaning of the statute. That decision, by plain inference, is contrary to the appellant's contention here. Respondent was not engaged in an extra hazardous work within the meaning of the act. Though § 2 points out that "there is a hazard in all employments," it provides statutory compensation only for injuries received in employments recognized as "inherently and constantly dangerous," and which it enumerates as extra hazardous. As we said in the *Guerrieri* case:

"The manifest intent of the law is not to cover and compensate for accidents generally, but to cover accidents occurring in those employments or occupations which are specifically classed as, or which may be found by the commission to be, extra hazardous."

On a careful reconsideration of the whole question, we are satisfied that the *Guerrieri* case was correctly decided and is controlling on the facts here.

The other contention is that the verdict is excessive. The injury was mainly to the sciatic nerve, resulting in a partial paralysis of the right leg and foot. There was also a small hernia and an injury to the kidneys, causing a passage of blood. All of these conditions persisted at the time of the trial, nine months after the injury, the last, however, only to a slight extent. The leg was still swollen and of a bluish color. The respondent was still on crutches. He is nervous and suffers from insomnia. He is fifty-four years old, but had always been strong and well prior to the injury. As to

the man's condition at the time of the trial, the testimony presents a sharp conflict. Of five physicians who had examined him a short time prior to the trial, two intimated a belief that he was malingering, and were of the opinion that the injury to the leg was not permanent. Three were strong in the opinion that his suffering was real, and two were of the positive opinion that the injury to the leg was permanent. The third expressed doubt as to whether the full use of the leg would ever be restored. Upon this conflict of evidence, the question of the permanency of the injury was one for the jury, as was also the amount of the damages. The award is large, but the evidence gives us no warrant to interfere with the verdict. To do so would be a wanton invasion of the province of the jury.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and FULLERTON, JJ.,
concur.

[No. 12806. Department One. January 6, 1916.]

E. M. SKOUG, *Respondent*, v. JOHN M. DOWNS *et al.*,
Appellants.¹

APPEAL—REVIEW—VERDICT. The verdict of a jury will be disturbed on appeal only where it can be said that there are no facts which will support the legal conclusion that a judgment should be rendered.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 3, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a broker's commission. Affirmed.

D. R. Glasgow, for appellants.

Zent, Powell & Redfield, for respondent.

PER CURIAM.—No question of law is involved in this case. It was tried by a jury. There is testimony to sustain the

¹Reported in 154 Pac. 126.

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verdict. In such cases this court will not inquire into the preponderance of the evidence, or interfere with the verdict, or with the judgment of the trial court in denying motions for directed verdict, judgment *non obstante veredicto*, and for a new trial. We interfere in jury cases only when it can be said that there are no facts which will support the legal conclusion that a judgment should be rendered.

A part of a real estate commission which respondent claims, and which is the foundation of his suit, was taken in the form of a promissory note which was discounted by appellants. It is contended that, in any event, respondent's judgment must be diminished to the extent of the discount. Whether respondent was bound to lose the discount, or any part of it, was for the jury.

The judgment is affirmed.

[No. 12852. Department One. January 6, 1916.]

H. C. STUHT *et al.*, *Respondents*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellant*.¹

INSURANCE—ACCIDENTS—AUTOMOBILE INSURANCE—POLICY—LOSSES COVERED. Under an automobile insurance policy covering losses by collision, which expressly excluded damages from the upset of the automobile unless such upset was a direct result of a collision, there can be no recovery for damages to a car which, in coming down a steep grade at a rapid rate of speed, got out of the road on a sharp turn and upset on the brink of a hill without colliding with anything and went down the hill and there collided with a tree.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 12, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on an automobile insurance policy. Reversed.

Shepard, Burkheimer & Burkheimer, for appellant.

Vince H. Faben, for respondents.

¹Reported in 154 Pac. 137.

MOUNT, J.—This is an action upon a policy of automobile insurance. The complaint, after setting out the terms of the policy, alleged that, on August 9, 1913, the insured automobile was wrecked and destroyed through a collision between the automobile and the wooden planking constituting a portion of the sluice box at the side of the roadway and projecting into the highway, and by striking and colliding with a tree near the roadway, and striking violently the ground near the roadway then being traveled by the machine, to the damage of the plaintiff in the sum of \$1,000.

The amended answer of the defendant admitted the issuance of the policy, but denied all the other allegations of the complaint; and alleged two affirmative defenses, which it will not be necessary to notice. The case was tried to the court and a jury. At the conclusion of the plaintiff's evidence, the defendant moved the court for a directed verdict, and again made the same motion at the close of all the evidence. Finally, after a verdict was returned by the jury, a motion was made for judgment notwithstanding the verdict. These motions were all denied, and a judgment was entered upon the verdict. The defendant has appealed.

We are satisfied that these motions should have been granted. The policy sued upon insures the plaintiff against damage to his automobile "if caused solely by collision with another object, either moving or stationary (excluding, however, all loss or damage by fire from any cause whatsoever; all loss or damage caused by striking any portion of the roadbed, or by striking street or steam railway rails or ties; and all loss or damage caused by the upset of the injured automobile unless such upset is a direct result of such a collision as is covered hereby.)"

The evidence for the plaintiff shows that the automobile in question had been taken to a repair shop to have some repairs made thereon. After the repairs had been made, the mechanic took the automobile and started to deliver it to the owner. He testified that he did not go directly to the

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garage of the owner, but went in a round-about way, intending first to go to his home, and from thence to take the car to the owner. He was the only witness who testified for the plaintiff as to the manner of the damage to the car. He testified upon that question as follows:

"In the month of August. It was between seven and eight o'clock sometime; it was after the sun, I think, was down. Well anyhow, it must have been along about that time; I don't remember exactly. . . . Well I was going west—or east, I should say, on Norman street; this was between—I passed 13th avenue; from 13th it is quite a little steep grade down to 14th; 14th is the end of Norman street; it ends there. I think about the middle of the block some one crossed the street in front of me and I turned in close to the curb on the right hand side. When I came to 14th—it is very narrow; 14th avenue is very narrow at that point, and in making the turn—I couldn't make the turn in the street, and I went out where the sidewalk strip should be. Of course, I knew I was getting dangerously close to the edge of the bank, but I felt I was safe and was getting back into the road, when all at once, I went down the bank. . . . Of course, I knew I was headed back. I got the wheels back and I headed up 14th avenue, or should have been. I was out in the sidewalk strip, all right, but at this point the machine came up, and the next thing I knew, a man was leaning over me down the hill—down ten or fifteen feet below, and he asked me if I was hurt. I was stunned; I didn't know just exactly how long it was. I didn't lose consciousness, but I was stunned, and the machine was a few feet farther down the hill than I was, against a tree."

The witness testified that the bank at that point was steeper than 45 degrees; that these streets were asphalt paved streets; that he did not see any water drain or sluice box; that on the next day he returned to the scene of the accident and examined the place. He testified that the front end of the automobile evidently rolled down the sluice box, and that was what kept the automobile from crushing him. He then testified:

"It is a wooden box, and at one time or another—it looks like it was used for a sluice box or sewer, and that runs down the hill quite a little ways and sticks above the level of 14th avenue just a little ways . . . I should judge it would be a foot . . . Just about 20 feet before I started to make the turn, I realized I was so close to the right hand curb, it would be hard to make the turn after I got over there. I didn't realize the narrowness of 14th avenue until after I got so close—I could see it would be awful hard to make the turn into 14th avenue, and then I set the brakes, trying to slow down. I thought I was headed safely back into the street—I knew I was dangerously close to the bank, and I had the wheels turned as far as they would go to the right. I thought I was safely back on the level. It didn't go over or shoot over; it came to a sudden jar and it turned sideways."

He then goes on to explain the damage to the car.

It is not claimed by the respondent that this sluice box was in the street, or even in the sidewalk strip. The testimony shows that it was to the side of the sidewalk strip lying on the side of the hill, and projecting above the level of the street about a foot.

It seems too plain for discussion that this car was being driven down the hill at a rapid rate of speed, when the driver attempted to make the short turn to the right onto 14th street, and on the brink of the hill, the car upset and went over the hill. It was plainly a case where the car upset before it struck anything outside of the road. If the evidence of this witness is not clear upon this point, the evidence of the defendant's witnesses shows very clearly and beyond dispute that the sluice box in question was lying on the side of the hill, and not in the roadway. The marks upon the sluice box to which the plaintiff's witness referred were some distance down the hill, and showed where the car first struck the sluice box after the upset. The plaintiff's witness himself says this sluice box saved his life.

We have no doubt, from the plaintiff's own evidence, that this was a clear case of the car upsetting upon the brink of

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a precipice without any other cause. It was the duty of the trial court, therefore, to have directed a verdict upon the first motion made by defendant, because the policy provides that, if the damage is caused by an upset of the injured automobile, unless such upset is the direct result of a collision such as is covered thereby, such damage is not insured against. There was no collision with any object shown. The only claim of the respondent is that there was a sudden jar. It is argued from this that the jar was caused by a collision. But aside from the mere fact of a jar, there is nothing to show that there was anything in the roadway, either movable or stationary, that the automobile could have collided with. It simply went over the bank. The jar that the witness spoke of was no doubt caused by the automobile letting loose from the roadway and starting to turn over as it went down the precipice. It is plain, we think, that the court should have directed a verdict in favor of the defendant.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

MORRIS, C. J., CHADWICK, and ELLIS, JJ., concur.

[No. 12665. Department Two. January 6, 1916.]

HARRIET MUMFORD, *Appellant*, v. CARMICHAEL J. SMITH
*et al., Respondents.*¹

EXCHANGE OF PROPERTY—RESCISSION—FRAUD — EVIDENCE — SUFFICIENCY. The owner of farm lands exchanged for an apartment house in reliance upon false representations, was defrauded and is entitled to a rescission, where it appears that she gave property of the value of \$4,000 to \$5,000 in return for an equity in the apartment house not exceeding in value \$500, and her vendee falsely represented the income from rentals, the desirability of the location, and that a railroad company was about to build a depot in the vicinity, and that he had customers for the apartment house to whom he could sell it in a few months at a price which would net the values of the property given in exchange; the gross inadequacy of price being a badge of fraud, and some of the representations relating to matters the truth of which was not readily ascertainable, and not merely "seller's praise" or matters of opinion.

SAME—FRAUD—RESCISSION—DECREE—RELIEF — MONEY JUDGMENT. Where, in a rescission of an exchange of real property for fraud, a recovery in specie is precluded by the defendant's sale and mortgage of parts of the property to *bona fide* purchasers, the plaintiff is entitled to a recovery in specie of the mortgaged and unsold property, with recovery over against the defendant personally for the amount of the loss, measured by the mortgage and the value of the property sold, upon reconveying the defendant's property.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 24, 1914, in favor of the defendants, in an action for rescission, tried to the court. Reversed.

Aust & Terhune and *J. Y. Kennedy*, for appellant.

E. C. Dailey, for respondents.

FULLERTON, J.—In the early part of the year 1913, the respondent Carmichael J. Smith, a real estate broker doing business in the city of Everett, inserted an advertisement in a local paper offering to exchange a hotel in that city for

¹Reported in 154 Pac. 153.

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farm lands. The appellant, Mumford, noticing the advertisement, called upon Smith with a view of making such an exchange. Mrs. Mumford at that time owned a forty-acre tract of land situated near Marysville, in Snohomish county, and some one hundred lots in an addition to the town of Des Moines, in King county. Together they visited the hotel mentioned in the advertisement, and the appellant expressed her satisfaction therewith, but no serious, if any, negotiations were had with the owner looking to an exchange of property. Smith had, in the meantime, acquired the legal title to an apartment house and the lots on which the same was situate, in the city of Everett, and he immediately directed the appellant's attention to this property, offering it in exchange for her property. After some negotiation, an exchange was effected, the appellant taking the apartment property, and the respondent taking the forty-acre tract and some seventy-one of the lots in the Des Moines addition. The deeds were exchanged on June 13, 1913. Later on, the appellant conceived that she had been overreached in the transaction, and brought the present action to rescind the contract. In her complaint she set forth at length the negotiations between herself and the respondent Smith leading up to the exchange, and charged him with falsely misrepresenting the income derived from the property, and with making false representations concerning its condition, its desirability as an apartment house, and its proximity to certain improvements about to be instituted by a public corporation which would greatly enhance its value. Issue was taken on the complaint, and a trial had which resulted in a judgment for the respondent.

The trial judge made no findings of fact, nor does the record otherwise disclose the grounds upon which he rested his decision. The evidence makes it clear, however, that he could not have found that the appellant was not defrauded. On this question, there is no room for even a reasonable doubt. She gave up property in the exchange which the re-

spondent admits had a substantial value, and which conservative witnesses estimated to be worth from \$4,000 to \$5,000 over and above its incumbrances. She received nothing in the exchange other than the apartment house property and certain furniture contained therein. No disinterested witness valued the apartment property in excess of \$3,500, or the furniture in excess of \$300, and some of them placed the values at even a less sum. The apartment property was taken subject to two mortgages, the one for \$1,300, on which the interest was in arrears for more than a year, and the other for \$1,500, on which the interest was in arrears for more than a year and a half; in fact, on the latter mortgage no interest had been paid since its execution. Giving the property its highest valuation, she did not receive, for the very considerable property she deeded to the respondent, values in excess of four or five hundred dollars.

There is but little question, also, that she was actually deceived and overreached by the respondent. While many of the representations she charges him with are denied by him, the record leaves but little doubt in our minds as to where the truth lies. He represented that the property would produce in rentals \$24 per week, whereas it could not subsequently be made to bring as much as half of that sum, and this under the management of the respondent himself; he represented to her that the property was in a desirable locality for an apartment house, whereas it was shown that it is situated in what was formerly a restricted district, and because of its locality was not sought by a desirable class of tenants; he represented that a railway company had recently purchased lands in the vicinity for a right of way and would shortly erect a depot near the property, whereas no such right of way had been purchased nor was the building of a depot, so far as shown, even contemplated by a railway company; he represented that the property could be turned into cash within a short period at a price which would net the appellant the values she placed upon the property she was

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given in exchange, and that he had a customer ready to take it at such a price, or to use her language: "He said he wanted three months time within which to sell the property, because he had a purchaser from Seattle waiting for their money to be handed over to them when the court decided, to buy the Knapp place. He said they had been up several times and were perfectly satisfied with the place and just asked for time until their money could be got from the east; they seemed to be heirs, as I understood it, and their case was in court and was to be decided in a short time, and by the time the case would be decided, the depot would be started and he would get \$12,000 for that place; that was the way the deal was planned. He was to sell the Knapp property to those people and give me, less the commission, \$12,000; the mortgage to be deducted;" whereas he knew that the property could not be so sold for the price stated, that he had not shown it to any Seattle parties and in fact had no customer. As we say, there can be no other conclusion drawn from the evidence than that the appellant believed these representations and was induced to make the exchange she did make because of them.

The further question is, do these representations justify a rescission of the contract. It is our opinion that they do. In the first place, the difference between the values of the properties exchanged was so gross as to challenge the good faith of the transaction. In so far as the appellant is concerned, there was a gross inadequacy of consideration—for the thousands that she gave up she received only hundreds in return—and gross inadequacy of consideration has always been regarded as a badge of fraud. In the second place, all of the representations made by the respondent were not mere "seller's praise" or mere matters of opinion. Some of them, at least, related to matters of fact, the truth or falsity of which could not readily be ascertained by the appellant. She could not readily ascertain, for example, whether a right of way had been purchased by a railroad company for a line of

railway which would run near the property and that a depot building was to be constructed near the property, nor could she readily ascertain whether the appellant had under way a sale of the property which was being delayed merely because of certain necessary formalities in court procedure; and these we think were representations with reference to material matters, purposely used with the intent to deceive and defraud.

We said in *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55, that all the cases agree that the purchaser may rely upon representations of the vendor where for any reason the falsity of the representations are not readily ascertainable, and, clearly, the principle is applicable to certain of the representations made here. Some of the representations claimed to have been false and fraudulent may fall under the denomination matter of opinion; but the result of the whole was that the appellant was overreached and the respondent, because thereof, obtained an unjust and unconscionable advantage. The observation of Judge Root in *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799, therefore seems pertinent, namely:

“Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by

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a bold and forcible robbery, or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed from the standpoint of public policy. It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose."

It remains to inquire what form of decree should be directed. After receiving possession of the deeds, the respondent immediately sold the lots at the town of Des Moines, and increased the mortgage on the 40-acre tract from \$1,000 to \$1,200, retaining, however, the legal title to the latter property. It is not questioned that the purchasers of the lots situated at Des Moines, and the mortgagee of the forty-acre tract acted in the utmost good faith and, under well-known principles, the interest acquired by them cannot be questioned by the appellant. This precludes a recovery in specie of the lots, or any modification of the mortgage, but (the defendant being insolvent) it does not prohibit a recovery in specie in so far as recovery affects only the immediate parties to the contract, with a judgment over against the party perpetrating the wrong for the value of the property he has placed beyond the reach of the process of the court. This principle would entitle the appellant to a recovery of the forty-acre tract in specie, and to a judgment against the defendant Carmichael J. Smith for the value of the Des Moines lots, plus the difference in the amount of the mortgage on the forty-acre tract at the time of the exchange and the amount to which it was subsequently increased. There is some contrariety of opinion in the evidence as to the value of the Des Moines lots, but conservative witnesses valued them

at from \$1,000 to \$1,500. The appellant received certain small sums in rents from the apartment house with which the respondent must be credited. Striking a balance, we find that the money judgment to which the appellant is entitled is \$1,250. The appellant must also reconvey to the respondent the apartment property.

The decree of the lower court is therefore reversed, and the cause remanded with instructions to enter a decree in accordance with this opinion.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 12325. Department One. January 7, 1916.]

JAMES CARKONEN, *as Administrator etc., Appellant*, v.
COLUMBIA & PUGET SOUND RAILROAD COMPANY,
Respondent.¹

JUDGMENT—NOTWITHSTANDING VERDICT — MOTION — TIME FOR. A motion for judgment notwithstanding the verdict comes too late when not made until after the clerk has entered judgment on the verdict in compliance with Rem. & Bal. Code, § 431.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 24, 1914, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Brady & Rummens, for appellant.

Farrell, Kane & Stratton and *Stanley J. Padden*, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—Original opinion, 86 Wash. 473, 150 Pac. 1162. Respondent has applied for rehearing *En Banc*, and urges, among other things, that the motion for judg-

¹Reported in 154 Pac. 123.

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ment notwithstanding the verdict was granted before the decision of this court in *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, which was decided August 14, 1914, while the notice of appeal herein was filed June 15, 1914. We make this additional statement in justice to counsel for respondent, that it may not appear that the making of the motion at such time was a careless oversight of a question of practice on the part of counsel.

It is also urged that we should have followed the precedents set in *Pierce v. Seattle Elec. Co.*, 83 Wash. 141, 145 Pac. 228, and *Boyce v. Chicago, Milwaukee & Puget Sound R. Co.*, 82 Wash. 204, 144 Pac. 27, decided after the *Forsyth* case, in which cases we, for the time, suspended the operation of the rule established in the *Forsyth* case, because of the fact that the practice condemned by the *Forsyth* decision had not always been understood and the cases cited were pending when the *Forsyth* case was decided. Such was true in this case also. But the great number of such cases coming here has impelled us to adhere to the rule established by the *Forsyth* case; otherwise the continual exceptions would require endless distinguishing decisions, or result only in additional confusion. Hence, we have decided to hereafter in all cases hold to the rule adopted in the *Forsyth* case.

[No. 12846. Department One. January 7, 1916.]

MINNA DOMRESE *et al.*, *Appellants*, v. THE CITY OF ROSLYN,
Respondent.¹

WATERS AND WATER COURSES—DIVERSION—INJUNCTION—ESTOPPEL—REMEDY AT LAW. A landowner who granted a right of way and acquiesced in the construction of a city pipe line across her premises for the purpose of diverting waters for a city water supply cannot, after the completion of the works, maintain an action against the city to enjoin its appropriation of the waters, which were riparian to the land, but will be left to her remedy by action for damages.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered November 19, 1914, in favor of the defendant, in an action to enjoin the diversion of the waters of a stream, tried to the court. Affirmed.

O. O. Felkner, for appellants.

E. E. Wager and *Harry L. Brown*, for respondent.

CHADWICK, J.—Appellant Minna Domrese is the owner of a tract of land situate in a mountain canon near the city of Roslyn. Appellant Hamer is her lessee.

In 1909, respondent put in a system of waterworks. It took its supply of water from Cedar creek, which flows in the canon and over the lands of appellant Domrese. The water was taken at a point above, and conducted through a pipe line over and across, her land. At the time the work was in progress, she objected to the trespass of the city. After some negotiations, she executed a deed for a right of way for the pipe line and the city completed its work.

In 1914, this action was begun. Appellant sets up her title, alleging that the city has appropriated the waters of the creek, which is riparian to her land, and asks that respondent be enjoined from a further diversion of the water. The court below denied this relief upon the ground that the

¹Reported in 154 Pac. 140.

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Opinion Per CHADWICK, J.

waters of the stream had not, for a period of ten years, been put to any beneficial use, and upon the ground of equitable estoppel.

We think it unnecessary to inquire whether the judgment of the trial judge can be sustained upon either one of these theories. Granting, but without deciding, that appellant has a cause of action, the only question with which we are concerned is whether she has a remedy in equity. Respondent might, at the time of its trespass, if it was a trespass, have maintained an eminent domain proceeding. It might have condemned all of the interest of the appellants in the waters of Cedar creek. It did not do so, but did complete its water system and put the waters of the stream to a public use.

This court, since the case of *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205, was decided, has consistently held that injunction will not lie in such cases. The reasoning of that case is that a party who acquiesces in the construction and operation of a public utility is estopped to maintain ejectment or a suit for injunction, but will be left to his action for damages.

In *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, the deeper principle is adverted to; that is, that the wrong lies not in the taking but in the manner of the taking, for the taking, whether done directly or indirectly, is an exercise of a sovereign power. We held squarely that where one having a right to condemn property

“ . . . is about to take possession without condemnation, injunction is a proper remedy; where there has been a taking and the public function is being exercised, the only remedy is to take compensation. Whether we call the taking a tort, or say that the claimant can waive the tort and sue on an implied contract, it makes no difference; the law is the same. The constitutional right to compensate cannot be taken away, for the right to redress the wrong does not and cannot be made to depend upon statute law. The remedy is

in the courts having jurisdiction to redress wrongs under the forms of the common law.”

In *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304, an injunction was sought upon a similar state of facts. We said:

“Plaintiffs’ only remedy in this case is to recover damages. They cannot enjoin the work. They permitted the city to begin and prosecute the work until near completion and must now seek their remedy at law.”

In *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659, we likened the right to claim a homestead to the act of a city taking property for a public use without first resorting to an eminent domain proceeding. We said:

“The right of Peter A. Peterson to claim a homestead being referable to the sovereign power of the state, the case falls within the principle announced by this court in holding that the state, or any of its instrumentalities, having power to exercise the right of eminent domain, would not be ousted as for trespass after taking property and before ascertaining the damages to be paid; this, upon the theory that a right to take is a sovereign right and that the remedy in damages was open to the aggrieved party under the forms, modes and usages of the common law. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080.”

The wrong to appellants, if any, being not in the taking but in the manner of taking, and the work being done, it follows that equity will afford no remedy.

Judgment of the lower court is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

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Opinion Per ELLIS, J.

[No. 12849. Department One. January 7, 1916.]

M. H. COOK, *Respondent*, v. E. H. STORY, *Appellant*.¹

SALES—EXPRESS CONTRACT—TENTATIVE AGREEMENTS—LIABILITY OF BUYER AFTER REPUDIATION BY SELLER. Where a tentative contract for the sale of goods was entered into with an agent subject to approval, and the seller did not approve but repudiated it and offered a new contract which the buyer rejected, cancelling all outstanding orders, there was no express contract of sale upon which the seller could recover for goods forwarded, and the buyer was not obligated to accept goods ordered on the faith of the tentative contract as a working basis, where the seller repudiated the contract before the arrival of the goods; nor could the seller, after having repudiated the contract, claim a ratification of it by previous orders under it.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 6, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

G. C. Israel and H. B. Noland, for appellant.

Hayden, Langhorne & Metzger and McClure & McClure, for respondent.

ELLIS, J.—Action for the purchase price of certain automobile tires and tubes which it is alleged were sold and delivered to the defendant by plaintiff's assignor under a written contract. The plaintiff's assignor, W. D. Newerf, doing business as W. D. Newerf Rubber Company, in San Francisco and Los Angeles, was the Pacific coast agent for the Miller Rubber Company, a corporation operating a tire factory at Akron, Ohio. One C. W. Sahland, a traveling salesman for the Newerf Company, met the defendant, Story, in Seattle on May 28, 1913, and with him arranged the details of a contract appointing Story as general agent and distributor for the Newerf Company in the sale of Miller tires, tubes and accessories, the agency to cover the states of Washington, Idaho and Montana.

¹Reported in 154 Pac. 147.

Shortly after this conference, the parties went to Tacoma, and, at the office of Hugo Metzler, an attorney and secretary of the Auto Equipment Company, through which the defendant expected to supply the demand for Miller tires in that city, the defendant for himself, and Sahland for the Newerf Company, signed a tentative contract covering the three states for one year, subject to termination by either party on ninety days' notice. By this tentative contract, the defendant was to maintain at his own expense an office and show room in Seattle, carry a stock sufficient to meet the requirements of customers, and advertise the goods. The Newerf Company was to extend certain credit, furnish goods to the defendant at certain scheduled prices, allow certain trade and cash discounts, and make replacements of guaranteed tires on given terms.

This agreement was signed in duplicate, with the understanding that it was to be submitted to the Newerf Company for approval. Sahland throughout represented that he had no authority to finally approve the contract. This was testified to by the defendant and was admitted by Sahland himself. A blank for such approval appears at the foot of the contract. Sahland retained both copies of the contract for the purpose of submission to the Newerf Company for approval, stating that, if approved, one copy would be returned by the company to the defendant. He testified that he did in fact turn both copies over to the company for approval. It is admitted that the contract was never formally approved by the Newerf Company, and neither copy was ever returned to the defendant. On the contrary, a new contract, materially differing from the one submitted, and omitting from its operation the state of Montana, was prepared in duplicate by the Newerf Company and sent to the defendant with a request that he sign and return it for execution by the company.

On July 2, 1913, the defendant wrote the Newerf Company, declining to sign the new contract on the ground that

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it was not in accordance with his agreement with Sahland, and declining to proceed further in the matter. He testified that he then cancelled all orders, amounting to \$4,000 or \$5,000, which he had given, and the fact is not contradicted. Apparently all orders on which goods had not been delivered, save one, were treated as cancelled. That order, which is the one here involved, arose as follows: On June 1, 1913, the Auto Equipment Company, through its president, Lindquist, had ordered, through Sahland, tires and tubes to the amount of \$1,500, in anticipation of the races which were to take place at Tacoma in the first week of July. No word having been received from the order, the defendant, on June 10th, telegraphed the Newerf Company, among other things: "Wire Akron to ship me at Tacoma order prepared by Lindquist." The goods reached Tacoma about July 17th, billed to Miller Tire Company and Auto Equipment Company. Meanwhile, the Auto Equipment Company, having been advised that Story had closed his place of business in Seattle and severed his relations with the Newerf Company, sent one DeLand to San Francisco to make some arrangement with the Newerf Company. On July 9, 1913, he received from that company the following, which is termed in the record a letter of credit:

"San Francisco, Cal., July 9, 1913.

"Auto Equipment Co.,

"Tacoma, Wash.

"Gentlemen: In accordance with verbal understanding with Mr. John DeLand, we herewith grant you the privilege of selling Miller Quality Tires and Tubes, also other accessories carried by us, in the state of Washington until such time as we may close this territory with E. H. Story, yourselves, or other parties.

"We will furnish you, during this time, a stock of Miller Tires and Tubes not to exceed the amount of twenty-five hundred dollars. Such stock to be delivered either from San Francisco, Los Angeles or Akron, Ohio, in order to give the best service in supplying said stock.

"Your prices on Miller Tires, during this time, to be seven and one-half and five per cent from the two attached lists, you to pay us on the tenth of each month for all sales made from stock of Miller Tires furnished by us, when a further five per cent for cash will be allowed.

"Yours very truly,
"(Signed) W. D. Newerf Rubber Co.,
"Per J. E. Newerf."

He testified:

"On the 9th of July they gave me this letter of credit. I returned to Sacramento, then came here and went into the Auto Equipment. Mr. Lindquist and Mr. Metzler told me there was a shipment down there for Auto Equipment. It was about the 17th or 18th of July that the goods were delivered to us. Newerf had told me it was on the road and would be delivered to us on the letter of credit which I had at the time. They told me that when I was in San Francisco, and said the Story deal was off."

He also testified that, before returning to Tacoma, he went to Akron, Ohio, to arrange an agency for the Miller tires, and there met W. D. Newerf, who told him the same thing. Sahland, who was present at that interview, denied this, but admitted that DeLand was then told that "the deal with Story was entirely cancelled" and the Newerf and Miller Companies were at liberty to give the Washington agency to the Auto Equipment Company.

When the goods arrived in Tacoma, the railroad company, for some reason not explained, notified Story of that fact, but he refused to accept them and refused to authorize their delivery to the Auto Equipment Company, stating in effect that he would have nothing to do with the matter. The chief clerk of the freight agent of the railroad company at Tacoma testified that, on Story's refusal to accept the goods, he sent a telegram to the agent of the B. & O. Railroad, at Akron, Ohio, but was not permitted to state the contents of that telegram or what reply he received. At any rate, the goods were delivered to the Auto Equipment Company on July 17th. That company, as it now appears, was then in

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failing circumstances, and went into the hands of a receiver soon afterwards.

The court found, in substance, that the goods were sold and delivered to the defendant under the terms of the written contract, and that there was a balance of \$1,399.02 due thereon, for which amount, with interest at six per cent. from August 30, 1913, judgment was entered. The defendant appeals.

The appellant contends that no express contract was ever consummated, and hence the action, being on an express contract, cannot be maintained.

Under the evidence, we are clear that the execution of the written contract sued upon was never consummated. The tentative agreement was signed with the understanding that it would have to be submitted to the Newerf Company for approval. It was never approved, but was expressly repudiated by Newerf. A new and different contract was sent to him. He rejected it and cancelled all outstanding orders. The respondent seeks to meet this fact with the argument that no formal approval was necessary, in that the Newerf Company ratified the contract by accepting and filling orders under its terms. There would be force in this argument were it not for the undisputed fact that the Newerf Company expressly repudiated the first contract and sought to impose a new one. There was never thereafter an offer on the part of the Newerf Company to approve or deliver to appellant the old contract, or to continue operations under it. The fact that, under the first contract as a working basis, some goods were ordered, delivered and paid for, does not alter the fact that, even granting this sufficient to constitute a ratification, the Newerf Company itself refused to so regard it, or if so regarding it, rescinded the contract. Having itself repudiated or, what comes to the same thing, rescinded the contract, the Newerf Company cannot complain when the appellant meets it on the ground which it has elected to occupy. *Gibson v. Rouse*, 81 Wash. 102, 142 Pac.

464. The Newerf Company, before the arrival of the goods, having repudiated the contract upon the faith of which they were ordered, the appellant was under no obligation to accept them. He was under no obligation to thus lay himself open to the claim, now advanced as to the old contract, that he had ratified the new one by continuing to receive goods.

The respondent asserts that the contract forwarded to the appellant for execution was a "consignment contract" and not a selling contract, the inference being that it was not intended to take the place of the original agreement. This seems to be based upon a misconception of the record. It is true there had been some negotiations looking to a contract for taking goods on consignment, but the contract sent was, by its terms, a selling contract and bore a memorandum that it was "intended to take the place of the one signed and handed to Sahland May 28th." That such was its purpose, Sahland himself testified. A letter in evidence from Newerf to Story so indicates.

The respondent did not sue on a *quantum valebat*, nor was there any evidence directed to that issue. He sued upon an express contract which he failed to prove.

The judgment is reversed, and the cause is remanded with direction to dismiss.

MORRIS, C. J., CHADWICK, FULLERTON, and MOUNT, JJ., concur.

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Syllabus.

[No. 12877. Department One. January 7, 1916.]

W. F. CRANDALL *et al.*, *Appellants*, v. ELIZABETH M. LEE,
Respondent.¹

FRAUDULENT CONVEYANCES—REMEDIES OF CREDITOR—LEVY AND SALE—TITLE ACQUIRED—CLOUD OF OUTSTANDING DEED—REMOVAL. A creditor may levy execution upon real property theretofore conveyed in fraud of his rights, without having an execution returned *nulla bona*, but sale thereunder does not remove the cloud of the outstanding deed, which must be done by a direct attack on the deed, alleging its fraudulent character and by pleading and proving that the debtor has no other property out of which he can satisfy the debt.

SAME—CONVEYANCE FROM HUSBAND TO WIFE—PRESUMPTIONS—QUIETING TITLE—COMPLAINT—REQUISITES. In an action by a judgment creditor to quiet title to property purchased at execution sale, as against the wife of the judgment debtor claiming under a deed in fraud of creditors, which was a matter of record, it is not sufficient to allege that the defendants claim some interest in the property unknown to the plaintiff, on the theory that the deed from husband to wife was presumptively fraudulent; but the complaint must allege the facts as to the deed and relationship and show that plaintiff had an existing equity at the time of the transfer and that the debtor had no other property to satisfy the debt.

SAME—CONVEYANCE FROM HUSBAND TO WIFE—PRESUMPTIONS—BURDEN OF PROOF—ATTACK—PLEADING. A deed from a husband to a wife carries no presumption of fraud, either as a matter of substantive law or pleading, in view of Rem. & Bal. Code, §8766, authorizing it; and to gain the advantage of Id., §5292, placing the burden of proving the good faith of a transaction between husband and wife upon the party asserting it, one questioning a deed from husband to wife must plead facts showing that it was actually or constructively fraudulent as to creditors having an existing equity at the time of the transfer.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. In a judgment creditor's suit to quiet title to property fraudulently conveyed by the debtor to his wife, a complaint merely alleging adverse claims and stating none of the essential facts will not be deemed amended on appeal and held sufficient, under Rem. & Bal. Code, §§ 307, 1752, authorizing amendments to conform to the proof, where the essential facts were not established and did not appear from the findings, which were mere conclusions, it not appearing

¹Reported in 154 Pac. 190.

from the findings or judgment that the plaintiff had an existing equity at the time of the transfer; as in such case there are no facts, and there is no room for the application of the statute relating to amendments.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered November 2, 1914, in favor of the defendant, in an action to quiet title, tried to the court. Affirmed.

Shorett, McLaren & Shorett, for appellants.

Thomas Stevenson, for respondent.

CHADWICK, J.—On February 6, 1911, the appellant W. F. Crandall and another brought suit against Milton S. Lee, husband of the defendant, in the district court of New Mexico. Judgment was rendered in the courts of that state on April 20, 1911.

On February 1st, Milton S. Lee conveyed the land now in controversy to respondent by deed sufficient in form. The property is situate in the county of Kitsap, in this state. At the same time, Lee conveyed to respondent 480 acres of land in the state of Arkansas. The deed to the Kitsap county land was recorded in the office of the auditor on the 7th day of February, 1911.

On June 19th, 1911, the judgment creditors began an action upon the foreign judgment, making Lee and his wife defendants. The Lees are nonresidents. Service was obtained by publication, after the lands had been subjected to an attachment. The defendant, Elizabeth M. Lee, respondent here, made answer, tendering the general issue, and that the court rendering the judgment had obtained no jurisdiction over her or the subject-matter of the action. Judgment was entered on June 29th, 1912, against Milton S. Lee and the community consisting of Milton S. Lee and Elizabeth M. Lee.

The property was thereafter sold at sheriff's sale to these appellants. The sale was confirmed and a sheriff's deed exe-

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cuted. Thereupon appellants brought an ordinary suit to quiet title to the land as against the outstanding deed of the defendant.

After a trial upon the merits, the court, following the case of *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784, as we are told, held that plaintiffs could not recover under their complaint. It is not clear from the record, but it would seem that the court treated the action as a suit by creditors to subject land alleged to have been conveyed in fraud of their rights to the payment of their claims, and, under the authority of the case mentioned, held that it was necessary for the plaintiffs to allege and prove that the debtors had no other property subject to execution at the time the conveyance was made, and rendered a judgment in favor of the defendant upon the theory that the complaint did not state a cause of action.

Appellants contend, first, that they are within the rule of *Wagner v. Law*, if it be in point; and second, that it is not in point, for the reason that in that case the conveyance was not made by a husband to a wife and therefore "presumptively fraudulent" as to creditors; and further, that the case went off on demurrer, whereas the present case was tried upon its merits, and we will, under a settled line of authority, deem the pleadings amended to conform to the proofs.

Appellants brought their action alleging no more than that they were the owners in fee of the property; that defendant claimed some right or title in it adverse to them, the exact nature of which they could not aver, and prayed that she be required to come in and set up her interest, if any, and that title be quieted in them.

The case of *Wagner v. Law* settled two legal propositions. They are: A creditor may levy an execution upon property theretofore conveyed in fraud of his right and sell it without resort to a creditor's bill and without having an execution returned *nulla bona*; and second, if he brings an action to quiet the title acquired at an execution sale, he must go further than

to assert merely that the sale was made in fraud of his rights, as was done in *Wagner v. Law*. He must allege and prove that the grantor had no other property out of which he could have satisfied the judgment. The case has been followed in: *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 333, 32 Pac. 92; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101; *Preston-Parton Mill Co. v. Dexter Horton & Co.*, 22 Wash. 236, 60 Pac. 412, 79 Am. St. 928.

In the latter case, the court said of *Wagner v. Law*:

“A careful examination of this case shows that it was an action by the judgment creditor to set aside a fraudulent conveyance which was alleged to be a cloud upon plaintiff’s title. The plaintiff was a creditor and had, under execution, purchased the property. The real question in the case seemed to be that the judgment creditor had a right to maintain his action to set aside the fraudulent conveyance after he had enforced his execution under his judgment; that it was not then too late for him to maintain his action. The suit was between the judgment creditor and the fraudulent grantor and grantee. But it was also held in that case that the complaint did not state facts sufficient to constitute a cause of action, when it failed to allege that there was no other property of the judgment creditor at the time of the conveyance, out of which the creditor could satisfy his judgment.”

It is clear that appellants’ complaint is bad under the doctrine of these cases unless, as it is contended, the burden was upon the defendant wife to come forward and plead and prove that the deed was executed in good faith, or that appellants were not creditors having an existing equity.

After mature consideration and a rereading of the cases referred to, we are inclined to hold that one who questions a deed must plead the facts upon which he relies. This must of necessity be so, unless we admit appellants’ contention that a deed from a husband to his wife is “presumptively fraudulent.” If it is not to be treated as a void thing as to third parties, the complaint is clearly insufficient. Appellants

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contend in their brief that it is a void deed. The complaint does not, in any way, describe the deed, although it was a matter of record and reveals the relationship of the parties. To hold the complaint good would permit a plaintiff to claim title merely and put a defendant to the burden of setting up the deed which is assumed to be fraudulent, and the facts which are relied on, to exonerate it from an imputation arising from the single fact that the grantor was a husband and the grantee a wife.

If the law is as appellants insist it is, they would be entitled to judgment on the pleadings, unless defendant had set up the good faith of the deed although it is nowhere mentioned in the pleadings. On the other hand, if respondent had set up the deed and nothing more, in answer to a complaint charging no fraud but only title and an outstanding adverse interest, defendant would be entitled to a judgment on the pleadings, for the obvious reason, as we shall show, that the deed was neither fraudulent nor "presumptively fraudulent." In other words, respondent is not to be put to her burden of proof—there is no presumption—the difference in these terms is explained in *Welch v. Creech*, 88 Wash. 429, 153 Pac. 355—until a charge of fraud, actual or constructive, is made. This is but another way of saying that appellants' complaint does not state a cause of action.

We understand the rule governing the conduct of a creditor who questions a transaction of the kind now under consideration, as it is gathered from our decisions, to be: If he levies an execution and sells property assumed to be conveyed in fraud of creditors, he may do so, but such proceeding will not remove the cloud of an outstanding deed. If he does so sell and would remove the cloud, he must make a direct attack upon the deed by alleging its fraudulent character, and by pleading and proving that his debtor has no other property out of which he can satisfy his debt.

Expressions to the effect that a deed from a husband to a wife is "presumptively fraudulent" have crept into some of

our opinions. *Dill v. Carver*, 70 Wash. 103, 126 Pac. 86; *Patterson v. Bowes*, 78 Wash. 476, 139 Pac. 225. In its proper setting of fact, this statement may be true, but it cannot be laid down as a fundamental, either of substantive law or of pleading.

Such a deed may be questioned as any other deed, and if attacked by a sufficient pleading and preliminary proof, the burden is upon the one who claims the benefit of the transaction to explain it by clear and satisfactory evidence. One who would do so must be a creditor having an existing equity—a cause of action—at the time of the transfer, and he must allege the relationship, the transfer, and that the grantor is without other property to satisfy his debt.

Whenever the question has been squarely put up to the court, it has held that a deed from a husband to his wife carries no presumption of fraud. Such deeds have the sanction of the statute, Rem. & Bal. Code, § 8766 (P. C. 95 § 47):

“As between the parties [husband and wife] the conveyance was absolute and good as against the grantor [so good—in fact, as the court continues] and no interest, legal or equitable, remained in the grantor upon which a lien of judgment subsequently rendered could attach.” *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101.

The effect of such deeds has been considered by the court in *Klosterman v. Harrington*, 11 Wash. 138, 39 Pac. 376; *Hayden v. Zerbst*, 49 Wash. 103, 94 Pac. 909; *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033; *Powers v. Munson*, 74 Wash. 234, 133 Pac. 453; *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

In *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869, the court said, in considering the effect of a deed made by a husband to his wife:

“We think that it is a safe general rule to assume that parties in their dealings are actuated by proper motives; that, therefore, good faith with regard to such dealings will be presumed until the contrary is alleged or made to appear.”

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If any effect at all is to be given to the statute, it should follow that one who questions a deed from a husband to a wife should at least plead the making of the deed and a plain and concise statement of the facts that give him standing to question it. Otherwise we would be put to the holding that a defendant might be put to the burden of pleading no fraud where none is alleged.

The statute relied on, Rem. & Bal. Code, § 5292 (P. C. 95 § 3), puts the burden of proving the good faith of the transaction upon a wife who is the grantee of her husband, but it nowhere exempts the transaction of the ordinary rules of pleading. Fraud is never presumed. The burden of pleading fraud is always on the one who asserts it.

It is said in *Wagner v. Law, supra*, there is no substantial distinction between a case that is brought before and one that is brought after a sale, and further, that it is better to have a uniform practice, regardless of the particular proceeding adopted by the creditor. In this connection it is not out of place to say that it may well be doubted whether appellants' complaint sets up an existing equity. The mere assertion of a hostile title—the complaint goes no further—would hardly fall within the definition of the term.

“One must be said to have an existing equity when he has an existing right to future payment, though it be contingent, of which it would be inequitable to deprive him.” *Salaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, Ann. Cas. 1914 D. 760, 47 L. R. A. (N. S.) 320.

Nor do we think that appellants can recover under our holdings that, where a trial has proceeded on the merits, we will deem the pleadings amended to conform to the proofs. Rem. & Bal. Code, §§ 307, 1752 (P. C. 81 §§ 303, 1255). This case comes to us upon disputed facts, and to apply the rule of the statute we must find that the party who invokes it has sustained his right to maintain the case by competent evidence. If there are no facts, there can be no amendment. The trial court made no finding of facts. What purports to

be findings are no more than the legal conclusions that respondent has title and appellants have not.

Granting that, if the proofs were otherwise sufficient, we would hold that we would consider the pleading amended so as to allege that Milton S. Lee had no other property out of which the debt could be satisfied, appellants still could not attack the deed to respondent or invoke the aid of the statute of amendments, unless they first show that the debt which is the basis of their claim was that of a creditor having an existing equity at the time the deed was made. Otherwise the deed is good as between the parties and as against all the world. It is not "presumptively fraudulent." It may be actually or constructively fraudulent as to such creditors as the statute makes the object of its solicitude, and who have proved themselves to have sufficient standing to put the respondent to her proof. The true rule can be best stated by resort to two of our former decisions.

"While it may be true that a conveyance from a husband to a wife is not of itself a badge of fraud, either under the rule of the statute or the general rule cited, it is nevertheless a fact, which naturally awakens suspicion, lends greater weight to other unfavorable circumstances, and will be for that reason set aside upon less proofs of fraud than will a transaction between parties not having the same confidential relation." *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961.

"To attack the validity of a conveyance, the person asserting the fraud must be one who has been injured by the fraud; and, accordingly, a creditor of the debtor may so attack the conveyance. A conveyance made without consideration is presumptively fraudulent as to existing creditors of the grantor. *However, there is no presumption that such a transfer was made with a view to defraud subsequent creditors.* It becomes material, then, to determine whether Henry was a creditor of Yost and wife when the deed to Schroeder was executed." *Henry v. Yost*, 88 Wash. 93, 152 Pac. 714.

It will be seen, therefore, that there is no place to apply the rule, for appellants have not proven the debt, which was the foundation of the foreign judgment, to have been either

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"an existing debt" or "an existing equity" at the time the deed was executed. For these reasons, the cases relied upon by the appellants, *Brown v. Baldwin*, 46 Wash. 106, 87 Pac. 488; *Plath v. Mullins*, 87 Wash. 403, 151 Pac. 811; *Benham v. Hawkins*, 82 Wash. 390, 144 Pac. 532, are not in point.

If, after a trial upon the merits, the court can find from the facts, or from the fair inferences of facts, that a material fact has been proven although not pleaded, the court will readily apply the rule of these cases; but in none of our decisions, do we apprehend, has the court ever substituted for a material fact the grace and favor of the statute.

After reciting the appearances, the trial judge certifies the course of the trial to be:

"Thereupon the plaintiffs introduced as plaintiffs' exhibit 'A' the deed of purchase issued by the sheriff of said county to the plaintiff Crandall covering the premises described in plaintiffs' complaint. The plaintiffs also introduced as plaintiffs' exhibit 'B' all of the records and files in cause No. 2637 in said Kitsap county entitled 'William Crandall and J. N. Conn, plaintiffs versus Milton S. Lee and wife, defendants' including also the depositions in said cause of the said defendants Lee and wife.

"The defendant herein thereupon introduced in evidence as defendant's exhibit 1, the deposition in this cause of the defendant herein, Elizabeth M. Lee, the wife of said Milton S. Lee; and also introduced, as defendant's exhibit 2, the certain deed to the said premises in controversy executed by the defendant Milton S. Lee to his said wife Elizabeth Lee."

The findings of fact in the action in which the sale was had recites no more than the rendition of the judgment in the courts of New Mexico upon the 20th day of April, 1911; and the judgment, no more than that the "same is hereby established and declared to be a valid lien upon all the interest of the defendant, Milton S. Lee, individually, and the community interest of Milton S. Lee and Elizabeth M. Lee, his wife, in the lands, etc."

We know of no rule that would bind the respondent beyond the terms of the judgment. It is clear, therefore, that appellants have not proved that they stand in the shoes of a creditor having an existing equity at the time the deed to the respondent was made, under the doctrine of *Henry v. Yost, supra*, and *Eggleston v. Sheldon*, 85 Wash. 422, 148 Pac. 575.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12899. Department One. January 7, 1916.]

WALTER A. GODLEY, *Respondent*, v. ELWIN T. GOWEN,
Appellant.¹

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY. In an action by a servant for injuries sustained in cranking an automobile, the negligence of the defendant is a question for the jury, where it appears that he advanced the spark while plaintiff was truning the crank, which the defendant knew or should have known would have a tendency to cause the engine to back-fire and kick back.

SAME—INJURY TO SERVANT—INSTRUCTIONS. In an action by a servant for injuries sustained in cranking an automobile, upon an issue as to whether defendant ordered the plaintiff to crank the car, or whether he did so without defendant's knowledge and contrary to orders, an instruction as to the duty of the defendant as to warning plaintiff of the dangers in case he ordered or "permitted" the plaintiff to do so, is not prejudicially erroneous in the inapt use of the word "permitted," where there was in the case no idea of permission except as inferred from the order to crank the car, and it must have been so understood.

DAMAGES—PERSONAL INJURIES—FUTURE PAIN AND SUFFERING—INSTRUCTIONS. In an action for personal injuries, it is correct to instruct that the jury may award damages for pain and suffering to which plaintiff will be subjected in the future.

MASTER AND SERVANT—INJURY TO SERVANT—CHOICE OF METHODS—INSTRUCTIONS. In an action by a servant for injuries sustained in

¹Reported in 154 Pac. 141.

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cranking an automobile, an instruction as to the duty of the plaintiff, in case there was a safe and an unsafe method of performing the act, is inapplicable where plaintiff was not instructed as to the proper manner and did not know that one way was safer than another.

APPEAL—REVIEW—HARMLESS ERROR. Error in allowing \$100 damages on account of plaintiff's expenses, which were limited by the instructions to \$40, is cured by the remitting of \$200 from the verdict.

TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. In an action by a servant for personal injuries, counsel's statement that the defendant discharged the plaintiff shortly after the accident and refused to pay his expenses, is not such misconduct as to warrant a new trial, where the court, on objection, instructed the jury not to consider statements of counsel unless the same were supported by the evidence.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 17, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained while cranking an automobile. Affirmed.

Jas. A. Dougan, for appellant.

Walter S. Fulton, for respondent.

MOUNT, J.—The plaintiff had his arm broken while attempting to crank an automobile. He sued the defendant for damages, alleging negligence in two respects: First, the plaintiff was employed by the defendant as a clerk in a grocery store; that he was not familiar with automobiles; that, on the day of his injury, the defendant ordered him to crank the automobile without informing him of the danger thereof, and that, while the plaintiff was turning the crank to start the engine, the defendant, without notifying the plaintiff, advanced the spark lever, which caused the engine to kick back and break the plaintiff's arm; second, that the plaintiff did not know that there was any danger of the engine back-firing, or kicking back, that the defendant failed to warn

the plaintiff of the danger, and failed to instruct him how to take hold of the handle of the crank.

These allegations of negligence were denied by the defendant; and he alleged that the injury was caused by the plaintiff's own neglect; that the defendant ordered the plaintiff not to go about the automobile, but that the plaintiff voluntarily, in violation of orders, and without the knowledge of the defendant, attempted to crank the automobile, and was injured.

Upon these issues, the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the sum of \$500 damages to his person, and \$100 expenses. The trial court granted a new trial unless the plaintiff would remit from the verdict the sum of \$200. This was done, and a judgment for \$400 was entered. This appeal followed.

Numerous assignments of error are made in the appellant's brief; but the assignments are discussed under six points, which we shall briefly notice.

It is argued, first, that the court erred in denying motions for a directed verdict and for judgment *non obstante*. This is based upon the contention that no negligence on the part of the defendant was shown. It is claimed that the evidence shows that the plaintiff knew as much about cranking the automobile as the defendant did, and that therefore it was not negligence for the defendant to request the plaintiff to crank the automobile. The plaintiff testified that he was unfamiliar with the management of the automobile, and was unfamiliar with the method of safely starting the engine. All the evidence tended to show that, when a person is turning the engine, or cranking an automobile, the advancement of the spark lever at that time will cause the engine to back-fire, or kick back. We think the evidence fairly shows that the defendant knew, or should have known, this fact. It was clearly negligence, therefore, for the defendant to advance the spark so as to cause the engine to kick back when he knew the plaintiff was turning the engine by the crank, be-

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cause it was clearly shown that, when an engine kicks back, or back-fires, the person holding the crank is placed in imminent danger. We are satisfied that, upon this fact alone, the question of negligence was for the jury, and the court therefore did not err in sending the case to the jury.

In the instructions to the jury the court, in substance, told the jury that, when an employee is ordered, or permitted by one having authority over him, to do a temporary work, beyond the work which he had engaged to do, and the one in authority knows, or ought to know from all the circumstances in the case, that such work is dangerous, it is the duty of the employer to caution and instruct a disqualified employee sufficiently to enable him to understand the dangers he will encounter. Another instruction was also given along the same lines.

It is argued by the appellant that the court erred in using the words, if the "defendant ordered or permitted the plaintiff to attempt to set the engine of the automobile of defendant in motion," because the use of the word "permitted" was confusing to the jury. It may be that the use of the word "permitted," taken from its connection with the facts of the case, was not apt; but it is plain from a reading of the instructions in connection with the facts that the court meant to tell the jury that if the defendant ordered the plaintiff to set the engine in motion, then it was the duty of the defendant to instruct an ignorant servant if dangers were attendant thereon. The plaintiff's case was based upon the allegation that he was ignorant of the dangers of cranking an automobile; that he was ordered by his master to do the work. The defense was based upon the statement that the defendant had forbidden the plaintiff to use the automobile, and that he was injured by disobeying the orders of the defendant; that he voluntarily, without the knowledge of the defendant, attempted to crank the automobile, and was thereby injured. There was no idea of permission, except as it may be inferred from an order by the defendant to the plaintiff to crank the

automobile; and we think this is what the court meant, and what the jury understood by the instruction. If the use of the word permitted was error, it was error without prejudice, because there was no contention on the part of the defendant that he permitted the plaintiff as a volunteer to crank the automobile. The defendant either ordered the plaintiff to crank it, or the plaintiff cranked it without the knowledge of the defendant and against his desires. We are satisfied, therefore, that these instructions were not erroneous under the circumstances.

It is next contended that the court erred in instructing the jury to the effect that, in estimating the amount of damages to be allowed to the plaintiff, they had a right to take into consideration the pain and suffering which the jury found the plaintiff to have sustained as the result of his injuries, "and any future pain and suffering, if any, that the evidence shows that the plaintiff will be subjected to." It is argued by the appellant that the complaint did not ask for damages for future pain and suffering, and that the plaintiff waived such suffering. This court has held in a number of cases that an instruction is erroneous where the jury are directed that they may find damages for future pain and suffering which would *probably* occur in the future. *Bennett v. Oregon-Washington R. & Nav. Co.*, 83 Wash. 64, 145 Pac. 62. The court in this case did not so instruct the jury, but instructed that they might find for future pain and suffering which the evidence showed that the plaintiff would be subjected to. We think this is a correct instruction, and therefore not erroneous. In the *Bennett* case, *supra*, we held, that where there is evidence that the plaintiff will be subjected to future pain and suffering, he is entitled to recover therefor. It is where there is a mere *probability* that the plaintiff will suffer that the instruction is erroneous. We find no error upon this question.

It is next urged as error that the court refused to give certain instructions to the effect that, if the jury found that

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the servant chose an unsafe way in which to perform the act, where there was a safe method which a reasonably prudent person would take, then the servant could not recover. This, no doubt, is the rule in a proper case; but the only application this rule could have here is as to the manner in which the respondent says he took hold of the crank handle. There is nothing in the record to show that there was a safe way, and also an unsafe way, in which to take hold of the crank handle. There was evidence to show that taking hold of the crank in a certain way was safer than taking hold of it in some other way. But the plaintiff also testified that he was not aware that there was a safe way to take hold of the crank, and an unsafe way. He was not instructed upon that point, and did not know. We think an instruction with reference to the choice of ways does not apply to such facts.

It is next argued that the verdict is excessive, and that the jury were influenced by passion, shown by the fact that in the instructions the jury were told that they could not return a verdict in excess of \$40 for expenses to which the plaintiff had been put for doctor's bills, etc., and because the jury returned a verdict for \$100 on account of this item. This, no doubt, was the reason that the trial court ordered a reduction of the verdict from \$600 to \$400. Conceding that the jury returned an erroneous verdict in the sum of \$100 when the instruction permitted them to return a verdict of only \$40 upon that question, that error was completely cured when the total amount of the excess verdict was stricken or reduced.

It is finally claimed that, in the opening statement of counsel for the plaintiff, a statement was made to the effect that, shortly after the accident, the defendant discharged the plaintiff from his employ and refused to pay his doctor's bill, and that this was misconduct which would warrant the granting of a new trial. When counsel made this statement it was objected to, and the court told the jury, in substance,

that they should not consider statements of counsel unless the same were supported by the evidence. We think this was not such misconduct of counsel as would warrant the granting of a new trial. We are also satisfied that the judgment as finally rendered is not excessive.

The judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 12904. Department One. January 7, 1916.]

STEPHEN E. CHAFFEE, *Trustee etc., Appellant*, v.

LUTHER HAWKINS *et al., Respondents*,

JOHN H. LYNCH, *Intervener*.¹

~~ACKNOWLEDGMENT—CERTIFICATE—IMPEACHMENT—PROOF—EVIDENCE~~
~~—SUFFICIENCY.~~ To impeach the certificate of acknowledgment of a mortgage, fair on its face, the evidence must be clear and convincing; and the burden is not sustained by the unsupported evidence of the mortgagors, two illiterate colored people, to the effect that they did not agree or intend to give a mortgage and signed the papers supposing them to be notes, and did not acknowledge them, where their testimony is denied by all who were present and challenged by all the concomitant facts and circumstances.

MORTGAGES—PRESUMPTION — DEFICIENCY JUDGMENT — LIABILITY OF GRANTEE—DEEDS—COVENANTS. A deed of mortgaged premises, made subject to liens generally, and subject to a particular mortgage which was described and which the grantee assumed to pay, does not render the grantee liable to a deficiency judgment upon another and prior mortgage, as a vendee is liable on such a covenant only where it is clear that he intended to pay a lien or indebtedness.

APPEAL—ABANDONMENT—SECOND NOTICE. Upon giving notice of abandonment of an appeal, a second appeal may be taken within the time limited, and it is immaterial that the first notice and bond was not withdrawn from the files.

APPEAL—RECORD—CONCLUSIVENESS. A formal order reciting the date of overruling a motion for a new trial should be corrected below and not questioned for the first time in the briefs.

¹Reported in 154 Pac. 143.

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APPEAL—TIME FOR TAKING—ENTRY OF JUDGMENT. The time for taking an appeal runs from the date of entering final judgment and not upon an oral announcement or the filing of a memorandum opinion.

APPEAL—REVIEW—FINDINGS. When clear, cogent and convincing evidence is necessary to overcome a presumption, findings upon conflicting evidence will be reversed if the evidence supported by the presumption preponderates against the findings.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered February 15, 1915, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Reversed.

Stephen E. Chaffee, for appellant.

John F. Chesterley and *Ira P. Englehart*, for respondents.

John H. Lynch and *Davis & Morthland*, for intervener.

CHADWICK, J.—Prior to October 22, 1913, defendants Luther Hawkins and Jennie Hawkins, his wife, were indebted to several persons upon certain promissory notes in the sum of \$80.10 each, and to another in the sum of \$274 upon a judgment theretofore rendered, in all, aggregating the sum of \$755.60.

Appellant is an attorney at law and had, prior to that time, begun a suit against the defendants Hawkins to recover the sum due upon the promissory notes. In consideration of a dismissal of the suit and the satisfaction of the judgment that had theretofore been entered against them, the defendants Hawkins made a new note, and a mortgage upon a forty acre tract of land, the legal title to which was then in them.

On February 1st, 1913, the defendants Hawkins had employed the intervener, Lynch, to defend an action involving their land, and had given a mortgage (in form a quit claim deed) in the sum of two thousand dollars to secure his attorney's fees and the expenses of the suit. In January, 1914, defendants Hawkins made, executed and delivered their deed

of warranty conveying the mortgaged premises to defendants Chesterley:

“Subject, however, to all liens, incumbrances and taxes which are a valid and subsisting charge upon said premises, and subject to a quit claim deed intended as a mortgage executed by Luther Hawkins in favor of John H. Lynch recorded in Volume 133 of deeds at page 634, deed records in the office of the auditor of Yakima county, Washington, which said grantee hereby assumes and agrees to pay as a part of the purchase price above mentioned.”

Thereafter appellant, acting as trustee for his clients, began this action to foreclose the lien of his mortgage. Mr. Lynch intervened, and from the complaint, the petition and answer in intervention, and the answer of the defendants, the issue whether appellant's mortgage was in fact executed, is drawn.

The court below found that the claims represented by appellant were valid claims at the time they were executed; that at no time, either before or at the time the mortgage purports to be executed, did the defendants Hawkins, or either of them, promise or agree to execute any mortgage, or expect or intend to do so, and that,

“As soon as the notes and said mortgage were prepared they were placed before the defendants Hawkins for signature and the said Hawkins and wife, relying upon Mr. Chaffee to prepare notes for their signature in accordance with the understanding and agreement theretofore had by them with him, did not read over the said notes and did not observe that there was with the same any document purporting to be a mortgage or any document other than a note, and appended their signature to the various papers as they were presented to them for that purpose; that after so doing they immediately left the office without either acknowledging or intending to acknowledge the execution of any mortgage, and never knew that they had signed a mortgage until the commencement of this action.

“That the defendants are illiterate colored people and, although able to write and read to some extent, yet they are slow of intellect, thought and speech, and it is difficult for

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them to comprehend business affairs of the nature involved in this suit."

The court further found that defendants Chesterley took their deed without actual knowledge of the existence of the appellant's mortgage; that they were not bound thereby, and had taken title to the land subject only to the lien of intervener's mortgage. The court accordingly held that appellant have judgment against defendants Hawkins for the full amount claimed and \$125 attorney's fees; that the mortgage given to secure him as trustee was null and void; that the Lynch mortgage was a prior lien for \$2,000, less the sum of \$294 which had been paid thereon; and that title to the land was in the defendants Chesterley.

Appellant's mortgage is in proper form and was seasonably recorded. It purports to be acknowledged before H. L. Miller, who was the cashier of the bank at Sunnyside, and is attested with his seal. The instrument and its acknowledgment is sustained by the testimony of the appellant and by the notary. The testimony of the defendants Hawkins is to the effect that they did not agree, and did not intend, to sign a mortgage; that if they did so the mortgage was given in ignorance of the fact that it was a mortgage. We have not overlooked the answer of the husband defendant that the signature was not his signature, but the whole of his testimony makes it plain—and it is not seriously contended that it is not so—that he intended to say no more than that it was not a binding signature.

A collateral issue was developed on the trial. It became uncertain whether the instrument was acknowledged in the office of the appellant or at the bank. Much is made of this uncertainty by counsel; but in the light of the whole record and the established principle that a deed fair upon its face, signed by the grantors and duly acknowledged, imports verity which courts will not lightly disregard, constrains us to hold that the place the deed was acknowledged is not very material.

Appellant contends that one who has signed a deed will not be heard to question it or to challenge the certificate of the notary who has taken and certified to his acknowledgment. There is abundant authority to sustain this premise, but we think the better doctrine is that a grantor may impeach such certificate for fraud or other reasons finding sustenance in any of the recognized principles of equity. We think the true rule is as stated in *Western Loan & Sav. Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703, where the court said:

“That the evidence required to overcome a certificate of acknowledgment must be clear and convincing is generally held, and it may well be said that where fraud or duress is not shown as a circumstance attending an acknowledgment, the unsupported testimony of parties directly interested in the impeachment is not of that clear and convincing character that is necessary to overcome a record and an official act.”

The doctrine is sustained in *Drew v. Bouffleur*, 69 Wash. 610, 125 Pac. 947, and *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735, Ann. Cas. 1913 B. 895.

See, also, 1 R. C. L. 294, as follows:

“Impeachability for fraud, accident, or mistake.—It is a maxim of the law that fraud vitiates all things, and certificates of acknowledgment are no exception to the rule. The other grounds upon which written instruments generally are open to attack may also be made the basis for the impeachment of certificates by the introduction of parol evidence. Many courts, reasoning that the officer taking an acknowledgment acts judicially, have asserted that if a certificate is regular on its face parol evidence may not be received to contradict it in the absence of an allegation of fraud, mistake, collusion, imposition or the like. According to this view, certificates are not entitled to the precise degree of credit that is given to judgments of courts of record; but they are held to be entitled to much of the weight and authority of records, and to be subject with some modifications to the same general principles of construction and intentment which apply to other matters of the same class.”

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All the books agree, however, that the evidence offered to impeach an acknowledgment regular in form must be clear, cogent, and convincing.

1 Cyc., at page 623, lays down the rule:

“Where a certificate of acknowledgment is regular on its face, a strong presumption exists in favor of its truth. . . . The proof to overthrow a certificate regular on its face must be so clear, strong, and convincing as to exclude every reasonable doubt as to the falsity of the certificate.”

In the case at bar, while it is true that the defendants Hawkins deny the mortgage, their testimony is not supported by any other witness, nor do there seem to be any equities which can be said to sustain their contention. On the other hand, their testimony is denied by all who were present, and is challenged by all the concomitant facts and circumstances. A pending action was dismissed. A judgment was satisfied which operated to release the property from the judgment lien. The mortgage was recorded and became a matter of constructive notice to the purported makers, and it may be fairly inferred from the record, a matter of notice to their attorney, the present intervener, and the defendants Chesterley. We conclude that the defendants and the intervener have not sustained the issue tendered by them by evidence that is strong, convincing, and cogent.

The only question now necessary for us to decide is whether appellant is entitled to a deficiency judgment against defendants Chesterley. The law is that a deed taken subject to prior liens does not bind the grantee to pay, unless it is stated in the instrument or is shown by independent evidence that it was taken in fact subject to the payment of the existing incumbrance, or that the existing incumbrance was a part of the purchase price. It seems clear to us that the assumption clause in the Chesterley deed did not bind the vendees to pay or make them personally liable for any lien or incumbrance other than the mortgage owned by the

intervener. The deed was made subject to liens generally, and subject to a particular lien which is described and which the grantee assumed to pay. Or, if the language be doubtful, appellant is in no better position. A vendee is bound under such covenants only when it is clear that it was his intention to assume and pay a lien or incumbrance. Jones, Mortgages, § 748, and citations. 27 Cyc. 1343. From this it follows that, if it be doubtful, the doubt will be resolved in favor of the vendee, and a recovery against him will be denied.

The court below held jurisdiction of the case until the case of *Union Central Life Ins. Co. v. Hawkins*, 84 Wash. 605, 147 Pac. 199, should be finally decided in this court, in order to determine whether the intervener was entitled to the full amount of his mortgage less the sum paid. That case being disposed of favorably to the intervener's clients, he is entitled to a foreclosure of his lien.

The case is reversed, and remanded with directions to enter a decree that will protect the lien of appellant and the lien of the intervener in the order of their priority.

MORRIS, C. J., MOUNT. ELLIS, and FULLERTON, JJ., concur.

ON PETITION FOR REHEARING.

[Decided May 1, 1916.]

PER CURIAM.—Respondents Chesterley have filed a petition for rehearing in which they complain that the court has not passed upon a motion to dismiss the appeal, and that we have reached a wrong conclusion upon the facts.

The first ground of the motion to dismiss is that appellant, having given a notice of appeal and bond, this court was vested with jurisdiction, and that such notice and bond could not, thereafter, be withdrawn upon the *ex parte* motion of the appellant; that the notice and bond having been actually withdrawn, there is no valid bond upon which respondents might

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depend if successful in this court. We did not notice this ground of motion for two reasons; the respondents did not prevail upon the appeal, and appellant thereafter gave notice that he had abandoned his attempted appeal and had filed another notice and appeal bond within the time allowed for appeal. This, appellant had a right to do under the statute, and it is a matter of no materiality whether the original notice and bond were withdrawn or allowed to remain as a part of the files of the court. Rem. & Bal. Code, § 1735 (P. C. 81 § 1223); *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381; *State v. Miller*, 80 Wash. 487, 141 Pac. 1139.

We did not notice the second ground for dismissal of the appeal, because the contention of the parties rests upon a difference as to when the judgment was rendered, and when a motion for a new trial was overruled. Inasmuch as there is a formal order of the court reciting that the motion for new trial was argued and overruled on the 26th day of January, 1915, we did not feel at liberty to question it upon respondent's assertion that they did not know of its existence until in the preparation of their defense on this appeal. The place to correct such errors is in the court below.

Another and sufficient reason for passing the second ground of the motion to dismiss is that we have heretofore held that the announcement of the court's intention, either orally or by way of memorandum opinion, is not the entry of a judgment; that the appealable order is the final and formal judgment of the court. *In re Christensen's Estate*, 77 Wash. 629, 138 Pac. 1. *Woody v. Seattle Elec. Co.*, 65 Wash. 539, 118 Pac. 633, is not in point. That case was an action at law. There had been a final and formal judgment of nonsuit, and a dismissal entered prior to the time of filing the motion for a new trial. Nine months later, counsel had the court sign a judgment. It was properly held that the time for appeal could not be enlarged in that way. There the motion for a new trial was timely made. Here it was prematurely made.

The fact that a motion for a new trial was made prematurely would not change the rule or make a judgment out of the court's memorandum. The formal judgment was entered on the 15th day of February, 1915, and an appeal was taken within the statutory time.

Counsel strenuously insist that we should have followed the trial judge in his findings of fact; that, by our ruling, we have denied to the trial judge, who is admittedly trained as an expert in weighing and sifting facts, the same consideration we would give to the verdict of a jury if it had found in the same way. In jury cases, courts will not assume to pass upon the weight of the testimony if there be fact, or inference from the facts, which would sustain the verdict; and we repeatedly affirm verdicts where we might have held to the contrary if we were free to do so. In cases tried by the court and in all suits in equity, the statute puts upon us the duty of trying the case *de novo*. If, upon a review of the evidence, it seems to preponderate in favor of the judgment, or we cannot say that it does not, we affirm the judgment or decree. But it seems to us that there is more than a question of preponderance here. We may grant that there is a bare preponderance, but the law demands more. To overcome a formal instrument and certificate of acknowledgment, the proof must be clear, cogent, and convincing. This is obviously a requirement of more than a bare, or even a measurable, preponderance of the spoken testimony. It means that the testimony of witnesses shall not be weighed, the one against the other only, but that the testimony of the one shall be measured against the other, supported as it is by one of the strongest presumptions of fact known to the law; that is, that an acknowledgment to a deed formally certified imports verity.

As clear a statement of the law as will be found is in *Lickmon v. Harding*, 65 Ill. 505.

"Public policy requires such an act should prevail over the unsupported testimony of an interested party, otherwise, there would be but slight security in titles to land."

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Mr. Devlin, citing many authorities, deduces the following formula:

"The evidence to impeach a certificate must be clear and convincing and must establish the fact beyond a reasonable doubt." 1 Devlin, Real Estate (3d ed.), § 529.

This is but a corollary of the statement that the certificate imports verity, and the rule that the certificate of a notary will not be overcome, even as between the parties, unless fraud and collusion be clearly established. We find nothing upon which to base a finding of fraud. The notary is not impeached in his personal character. The testimony of the Hawkins that they did not sign, or intend to sign, a mortgage is not enough (1 Devlin, Real Estate, § 529); or the fact that they were ignorant and subject to imposition, although a circumstance, is not enough (*Hersner v. Martin*, 8 Wash. 698, 36 Pac. 1096); or that it would have been more to the business interests of the Hawkins to refuse to sign the mortgage.

Neither is the fact that there was some confusion between the appellant mortgagee and the notary as to the place where the mortgage was acknowledged enough to destroy the legal effect of the certificate. The question of the place was collateral, going only to the credibility of the witnesses. It was, in a sense, immaterial to the real issue, the defense being that the mortgage was not signed or acknowledged at all.

Counsel still insist, as we understand, that we have put an unwarranted burden upon the Hawkins when we hold them to some proofs of statement or circumstance which may be fairly said to be independent; that there were only four witnesses, two against two; that this holding compels the Hawkins to prove a negative, which is humanly impossible; that, where it is impossible to call other witnesses, the court must follow those who "tell a straightforward story," and reject the others who are charged with shifting and changing. Granting, for the sake of argument, only, that the record

bears out counsel's assumptions, we still have the formally acknowledged mortgage, which must be given its proper weight. The sum of counsel's contention is that the instrument should be rejected because appellant and the notary are uncertain as to the place of acknowledgment. Our holding is that this is not a circumstance of sufficient importance upon which to predicate a finding of fraud. The law was settled in the *Waisman* case. It will bear further quotation:

"Public morals and public security are best served by the requirement of that degree of proof which is disinterested and unaffected by any private advantage sought, before a certificate of acknowledgment shall be held to be impeached." *Western Loan & Sav. Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703.

See, also, *Thompson v. Schoner*, 58 Wash. 642, 109 Pac. 116.

Nor does it follow that, because Mrs. Hawkins was not a party to the original debts, she is a corroborating witness. She signed the notes which the mortgage was given to secure and, under authorities so numerous that to assemble them would be an idle waste of time, became a party to the transaction now sought to be overturned and is bound in any event, and by the rules of evidence affecting parties to a questioned transaction.

Because of the insistence of counsel, we have reexamined the record and find nothing that would warrant a reversal of our first holding. Complaint is made that a judgment was taken against the Hawkins, and that they are liable for any deficiency which may remain after the property has been applied to the satisfaction of the debt. It is true, as asserted, that appellant, who appeared for himself at the trial, said that he was asking no more than a foreclosure of his mortgage, and was not seeking a deficiency judgment; but the court did find the full amount demanded to be due, and did render a judgment for that sum. No appeal was taken by the Hawkins, and it follows that, so far as respondents are

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concerned, their defense cannot be carried beyond a denial of the legal existence of the mortgage. Upon this issue, they have been heard fully.

We adhere to our opinion that the mortgage is a valid incumbrance, and a present lien upon the property.

[No. 12518. Department Two. January 8, 1916.]

ANDREW PETERSON *et al.*, *Appellants*, v. DENNY-RENTON CLAY & COAL COMPANY, *Respondent*.¹

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a shipping order constituted a complete contract for the sale of four million brick at \$17.25 per thousand, it is inadmissible to show by parol that it was not a complete contract but only an order for shipping brick of a different grade, previously contracted for at \$13.75 by a written contract therefor which had been lost.

SALES—WRITTEN WARRANTY—BREACH—PAROL EVIDENCE—ADMISSIBILITY. In an action to recover the price of "highway paving brick" sold under a written contract at \$17.25 per thousand, the defendant may show by parol, as a partial defense, that the brick furnished was of inferior grade of less value, known as No. 2, and quoted in plaintiff's price list at \$13.75 per thousand.

SALES—WARRANTY — BREACH — WAIVER — DAMAGES FOR INFERIOR QUALITY. Where brick was sold as "highway paving brick" there was an express warranty that the brick to be delivered would be highway paving brick, and the fact that the vendee accepted brick of inferior grade and less value without objection or offering to return them does not waive the warranty, or prevent him from offsetting his damages, in an action to recover the purchase price.

Appeal from a judgment of the superior court for King county, Humphries, J., entered October 16, 1914, in favor of the defendant, upon withdrawing the case from the jury, in an action on contract. Reversed.

John W. Roberts and *George L. Spirk*, for appellants.

Ballinger, Battle, Hulbert & Shorts, for respondent.

¹Reported in 154 Pac. 123.

stances under which the shipping order was signed, to establish that it was not a complete contract but only an order to ship brick previously contracted for. This offer was likewise refused. The ruling of the trial court in excluding this evidence is assigned as error. The shipping order was upon its face a complete contract between the parties covering all the terms of the order, and as the offer of testimony to prove a different contract did not tend to establish fraud in the procurement of the shipping order, but only to modify it by parol testimony, the trial court held correctly that the evidence was inadmissible.

A price list of the respondent was introduced in evidence showing the price of No. 2 brick as \$13.75 per thousand, and the amount tendered in court by Peterson would be the correct amount due the respondent for the brick delivered if it was No. 2 brick. Peterson made offers to prove by numerous witnesses that the brick actually delivered to him by respondent was No. 2 brick, and not highway paving brick, as provided for in the shipping order. The trial court refused this offer, and this we think was error. It would seem a travesty on justice to hold that a party could not show, in a suit to recover the purchase price, that the article delivered was not the article contracted for, but one of inferior quality and less value. It would be taking away a defense of litigants that has never been questioned by the courts. The authorities are united in holding that a vendee, when sued for the purchase price of goods, may show that the goods were not what he contracted for.

In *Smith v. Pickands*, 148 Mich. 558, 112 N. W. 122, the court held that the burden of proof was on the vendee to show that the goods delivered were not as specified in the contract, after an acceptance by the vendee.

In *Home Ice Factory v. Howells Min. Co.*, 157 Ala. 603, 48 South. 117, there was a contract by the terms of which the vendor contracted to ship the vendee the best quality of coal, and the vendee sought to escape liability on the pur-

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chase price on the ground that the coal received was of an inferior grade, and the court there held that the quality of the coal was an issue in the case, and evidence was taken on that question.

In *Neck v. Marquette Cement Mfg. Co.*, 158 Wis. 298, 148 N. W. 869, a quantity of cement was sold under a written contract, which provided that the cement should conform to standard specifications for Portland cement adopted by the American Society for testing materials with methods of testing recommended by the American Society of Engineers. Evidence was admitted showing that the cement was inferior by the use of another test, and in answer to the vendor's contention that the only way the cement could be shown inferior in quality was by the test provided for in the contract, the court said:

"In the absence of a provision in the contract making the test the sole evidence of the inferiority of the cement, the fact might be established by other evidence."

Mette & Kanne Distilling Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966, holds that, in an action by a vendor to recover the purchase price of chattels sold under a contract, the burden of proof is on the vendor to show a delivery of the goods described in the contract, thus recognizing the rule that the vendee can show that the goods delivered were not the goods described in the contract.

Respondent next contends that, because Peterson accepted and used the brick without notifying it, until this action was instituted, that they were of a quality inferior to that contracted for, he cannot now be heard to say that the bricks were inferior to those described in the contract. In discussing the rules applicable to this contention, it will be well to keep in mind that respondent is attempting to recover the purchase price of highway paving brick as provided for in the contract of purchase, there thus being an express warranty that the brick to be delivered would be highway paving brick. Peterson is not seeking to rescind the contract nor

to avoid liability for the value of the brick, but is attempting to set off the difference in price between the brick described in the contract and the brick he claimed to have received.

In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890, this court said:

"It is undoubtedly true that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. *But the right to recover damages on account of defective quality was in no wise affected.*"

Again, in *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.*, 68 Wash. 550, 115 Pac. 1087, we said:

"If we should concede that there was a breach of warranty, the rule is that a failure to give notice, or to offer to return the property within a reasonable time after discovering the defects, operates as a waiver of the right to rescind, and *leaves the purchaser only the right to recover or offset damages to the extent of the diminished value of the article.*"

In *Dayton v. Hooglund*, 39 Ohio St. 671, the court held that,

"In a suit for the price of a lot of iron manufactured by the plaintiff for the defendant, the defendant, in case there is a breach of warranty as to the quality of the iron, may *recoup* for such damages as he has sustained, although he has used the iron without offering to return it."

Other cases adhering to this rule are: *Stark Bros. Nurseries & Orchards Co. v. Mayhew*, 160 Mo. App. 60, 141 S. W. 433; *Grisinger v. Hubbard*, 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913 E. 87; *Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co.*, 22 Okl. 555, 98 Pac. 331; *Graff v. Osborne & Co.*, 56 Kan. 162, 42 Pac. 704.

The case of *Williams v. Miller*, 1 Wash. Terr. 88, cited by respondent, does seem to support its contention that the acceptance and use of goods estops the vendee from showing that they were not what he contracted for. But from the

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facts in that case it does not appear whether or not there was any warranty of the goods sold, or whether there was any provision in the contract for inspection, either of which conditions would change the rule; and, if that case could be construed as supporting respondent's contention, it has been impliedly overruled by the *Tacoma Coal Co.* and *Dickinson* cases, *supra*, in so far as it attempts to hold that a vendee is liable for the contract price of goods when he has accepted goods inferior to those described in the contract.

The case of *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373, holds that, where a party does not object to materials furnished for the construction of a building, but allows them to be used in the building, he cannot thereafter refuse to pay for them on the ground that they were inferior. But the contract in that case provided for an inspection on the part of the vendee. There is a well-defined distinction in the rule where an inspection or test is provided for in the contract, which was noticed by us in *Hurley-Mason Co. v. Stebbins, Walker & Spinning*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B 1131. In that case we said in part:

"The authorities cited by the respondent are clearly distinguishable from the case here. In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890, there was involved a sale of bricks by the manufacturer for the construction of coke ovens. The sale was not expressly subject to inspection or test and the order for the bricks negatived any implication to that effect. . . . While recognizing the rule, as sustained by the New York and Wisconsin authorities, that, in the absence of a warranty and a breach, the vendee's rights to recover damages does not survive the acceptance of the property, after an opportunity to discover defects, unless notice has been given to the vendor or the vendee returns or offers to return the property, the court points out the fact, which we have also noted, that this rule does not apply in cases of express warranty of quality."

Schopp v. Taft & Co., 106 Iowa 612, 76 N. W. 843, cited by respondent, sustains this doctrine and holds that, in the

absence of a warranty, when goods are tendered by the seller in performance of an executory contract of sale, and accepted by the buyer after an opportunity of inspection, without objection, the purchaser is liable for the price agreed upon.

In *Yeiser v. Russell & Co.*, 26 Ky. Law 1151, 83 S. W. 574, relied upon by respondent, the court said:

“There is no better settled principle of law than that, if a vendee accepts goods delivered under a warranty of quality, or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them, because not in conformity with the contract, or exercises ownership over them, he cannot thereafter refuse to pay for them.”

While this case holds that the vendee will have to pay for the goods, it does not hold that he has to pay the contract price, or that he cannot recoup damages for the difference between the contract price and the price of the goods actually delivered. In fact, in this very case the vendee did file a counterclaim for damages accruing from the failure of the vendor to deliver the goods he contracted to deliver, and a judgment for \$40 was entered in favor of the vendee and the vendor took nothing.

The right of a vendee, when sued for the purchase price of goods, to show that the goods received were not as contracted for is well established; *Tacoma Coal Co. v. Bradley*, and *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.*, *supra*. We conclude, therefore, that it was error to exclude evidence of the kind of brick actually delivered by the respondent, and for this reason the judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

FULLERTON, MAIN, and ELLIS, JJ., concur.

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Statement of Case.

[No. 12622. Department Two. January 8, 1916.]

WASHINGTON WATER POWER COMPANY, *Appellant*, v. THE
CITY OF SPOKANE, *Respondent*.¹

MUNICIPAL CORPORATIONS — STREETS — CONTRACT FOR EASEMENT — “GRADING AND OPENING.” A contract for an easement for a street in consideration of the city’s agreeing to refund any grade tax paid by the abutting owner for “opening, grading or improving any part of a street, excepting sidewalks,” contemplates more than a mere original opening for travel, which accordingly did not discharge the obligation of the city; but entitles the owner to reimbursement for assessments subsequently made for the establishment of a permanent grade, such as embankments, cuts and fills.

SAME—“IMPROVEMENTS”—“PAVING.” Such a contract does not contemplate refunds for paving as an “improvement,” where there was but little paving in the city at the time the contract was made; since “improvement” is a relative term, to be construed in conjunction with “opening” and “paving,” and as incidental thereto.

SAME—POWERS—ACQUISITION OF LAND—PAYMENT—REFUNDS—EXEMPTION FROM ASSESSMENTS—ESTOPPEL. Under Rem. & Bal. Code, § 7507, subd. 6, authorizing a city of the first class to purchase private property for public purposes, a city that did not at the time have the right of eminent domain may purchase an easement for a highway in consideration of agreeing to reimburse the owner by the repayment of any assessments against abutting property for opening, grading or improving the street; and after receiving the benefits, the city is estopped to question the legality of the mode of payment.

SAME—ACQUISITION OF LAND—PAYMENT—REFUNDS OF ASSESSMENT—CONTRACTORS—COVENANTS—RIGHTS OF SUCCESSORS. Such a contract inures to the benefit of the grantor’s successors, especially where the grantor covenanted that it would build all structures on its land (an island) of fireproof materials and expressly extended the covenant to its assigns, in return for which the city covenanted to build approaches to the island, making the latter covenant of special benefit to the grantor and its assigns.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 20, 1914, upon the verdict of a jury rendered in favor of the defendant by di-

¹Reported in 154 Pac. 329.

rection of the court, in an action to recover an assessment paid under protest. Reversed.

Post, Avery & Higgins, for appellant.

H. M. Stephens, for respondent.

MORRIS, C. J.—For a number of years prior to and on September 8, 1891, the Spokane Falls Water Power Company owned a small island, known as Havermale island, which lies between the channels of the Spokane river, in the city of Spokane. On the date mentioned, the company granted to the city an easement for the construction of Howard street across the island, the grantors retaining the fee to the land and other rights, which will be referred to as occasion arises. The particular covenant of the easement over which this controversy arises is as follows:

“And upon the further condition that the grantor herein shall be reimbursed by the city of Spokane, for any grade tax paid by it for opening, grading, or improving any part of said street, excepting sidewalks, and upon the further condition that when said highway is graded through the premises of the grantor, and any cut or fill is made necessary by the grading of said street, that the city, at its own expense, shall cause the land of the grantor abutting on said highway on the island between the second and third channels of the river from the south to be graded on an incline for a space of not more than one hundred (100) feet on each side so that it will be practicable for vehicles of all kinds to drive on and off the said highway along its entire length across said island, and also to build an approach on each side of the said highway on the third island when the highway crosses it, wide enough for vehicles of all kinds to drive on and off said highway by said approach on each side.”

Soon after the giving of this deed, Howard street was opened across the island, the channels of the river were bridged, and the street was thrown open for traffic. It does not appear that an assessment district was ever created for the construction of the street across the island. Arthur

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Jones, a member of the council at the time, testified that the cost of opening the street was probably included in the cost of building the bridges. Other members of the council at that time testified that the street was open for heavy traffic, but no one testified how much grading or other improvement had been done.

This portion of Howard street apparently remained as originally opened until August 4, 1911, when the city passed ordinance No. C262, providing for its grading, paving, and other improvement, and directing that the cost of the improvement be assessed against the abutting property. The abutting property had by this time, by various mesne conveyances, passed to the appellant, which made due exceptions to the confirmation of the assessment roll and demand that the assessment be canceled. All these exceptions and demands having been disallowed and refused, the appellant paid the assessment under protest, and after a proper demand, brought this action to secure a reimbursement of the amount paid, basing its right on the covenant in the deed of 1891.

The trial court was of the opinion that the testimony established that there had been, when the street was opened, such an improvement as the parties to the deed contemplated, and that the covenant should not be construed to prevent the city from levying an assessment on the property for subsequent improvements. The jury was accordingly directed to return a verdict for the city, and from the judgment of dismissal entered thereon, the Water Power Company has appealed.

Before inquiring into the power of the city to accept the easement and act under its provisions, we must first determine whether the city made, in 1891, all the improvements contemplated by the deed, or whether the covenant includes the improvement under consideration; for if the city, when it opened up the street, made all the improvements covered by the deed, then manifestly the appellant may not recover as-

sessments subsequently paid for improvements not within the contemplation of the parties at that time. The controlling language of the deed is as follows: "Any grade tax paid by it [the grantor] for opening, grading or improving any part of said street, excepting sidewalks." The city contends that it fully complied with the terms of the deed by the work done on Howard street at the time it was opened in 1891, and that for any further improvement subsequently made, it may assess and collect from the appellant without any liability to reimburse it therefor. We are of the opinion, however, that the improvement made in 1891 was not such as the deed contemplated. The term "grade" has been variously construed by the courts to include many forms of improvement, but we have found no instances where it has been held that a mere opening and preparation for travel, such as was apparently made in this case, fulfills an agreement to grade. In *Aldrich v. Board of Aldermen of Providence*, 12 R. I. 241, the court said:

"To grade a highway is to do more than simply prepare it for travel; for this may often be accomplished by slight superficial changes."

By the use of the two terms "opening" and "grading," the covenant in this deed evidently contemplated a permanent grade which would include everything necessary to establish the grade, such as embankments, cuts, and fills, and, on the authority of *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26, gutters and curbs. The deed also entitled the grantor to reimbursement for "improvements," which, the appellant contends, includes paving. While not strictly ambiguous, the term "improvement" has a wide range of meaning, and may or may not designate paving, depending on the sense in which it is used. As was said in *Wolff Chemical Co. v. Philadelphia*, 217 Pa. 215, 66 Atl. 344:

"The word 'improvement' is a relative term, and its meaning must be ascertained from the context, and the subject-matter of the instrument or writing in which it is used."

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The evidence discloses that, at the time this easement was given, there was very little if any paving in Spokane, and construing the terms of the easement in the light of that condition, and in conjunction with the terms "opening" and "grading," it is a fair interpretation that paving was not contemplated by the use of the word "improvement." Had the parties contemplated paving, they could have easily so stated, and the omission of the word "paving" must indicate that the improvements contemplated were those incidental to the opening and grading. We conclude, therefore, that, if the city is liable on the contract, it is bound to reimburse the appellant for the assessment levied for the grading, but not for the paving proper.

The next question is whether the city had power to enter into the contract with the grantor to reimburse it for assessments, considering that the acceptance by the city of the deed subject to the covenant created a contract to reimburse the grantor as provided therein. The city contends that the agreement with the power company was an attempt to exempt the company from any assessment for improvement of the street, and cites the following cases in support of its contention that such exemptions are void: *Pittsburgh, C., C. & St. L. R. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165; *Leggett v. Detroit*, 137 Mich. 247, 100 N. W. 566; *Whitcomb v. Boston*, 192 Mass. 211, 78 N. E. 407; *Vrana v. St. Louis*, 164 Mo. 146, 64 S. W. 180; *Rackliffe & Gibson v. Duncan*, 130 Mo. App. 695, 108 S. W. 1110; *Miners' Bank v. Clark*, 252 Mo. 20, 158 S. W. 597.

In the Indiana case the court said:

"Appellees maintain that the grant by the railroad company to the city of ground for use as a street was valid, but that the provision in the deed that the grantor and the remaining portions of the lot should not then or thereafter be charged with any expense connected with the extension or maintenance of that portion of such street was void. It has long been an established principle that private property may be appropriated for a highway when public necessity, con-

venience, or utility requires it. It is quite as essential that such highway be improved and kept in repair as that it be established in the first instance. It has been, and is, the theory of our law that the opening and improvement of a public highway will benefit the abutting and adjacent property, and that such property should be primarily and proportionately liable for the costs and damages occasioned thereby to the extent of such resulting benefits. This was the law in the year 1882, when the deed in question was executed, and it has continued to be the law to the present time. Conceding that the city of Rushville might purchase the title or an easement in land for use as a street, and obligate itself to pay a fair and reasonable compensation therefor, it does not follow that, as a part of the consideration, it could make a covenant or accept a condition that would annul a provision of its charter, and bind the discretionary judgment of future councils and governing bodies of the municipality. If, in consideration of the grant of such right, the city might lawfully release one man and his property from future liability for street improvements abutting such property, by the same right it might release all property within its jurisdiction, and thus make street improvements impossible, or subject an entirely different fund to the payment of the costs of such improvements from that provided by law. This provision of the contract was not only contrary to public policy, but in contravention of positive law. So far as the contract attempted to release appellant's property from liability for future improvements upon the abutting street, it was *ultra vires* and void. *Leggett v. City of Detroit* (1904), 137 Mich. 247, 100 N. W. 566; *Vrana v. City of St. Louis* (1901), 164 Mo. 146, 64 S. W. 180; *City of Shreveport v. Shreveport City R. Co.* (1901), 104 La. 260, 29 South. 129; Elliott, Roads and Sts. (2d ed.), § 148; *Richards v. City of Cincinnati* (1877), 31 Ohio St. 506; *City of Des Moines v. Hall* (1868), 24 Iowa 234, 241."

The substance of the decision in *Leggett v. Detroit* is contained in the following extracts:

"In the present case the most that can be claimed is that, in anticipation of a possible extension of certain streets, the council accepted a quitclaim deed of land contingently necessary upon a condition subsequent, to the effect that the

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land should revert if an assessment should be made against the grantors' land for the expense of any future opening of these streets to the north or south. . . . The case has been argued upon the theory that the city had attempted to make such an undertaking as the consideration for the deed. We have held that the right of eminent domain cannot be bartered away, and that contracts to do so by the legislature or any agencies of the state are ineffectual and void, as being against public policy. . . . In the present case the city has not agreed that it will not take any of this particular property by virtue of the power of eminent domain. It has, however, accepted a deed, upon condition that, should it do so, it will omit this property from assessment districts, and will relieve it from contribution to the expense thereof."

It is apparent that the Michigan court held the contract void, on the ground that the consideration sought to be paid for the deed was a waiver by the city of the power of eminent domain, which could not be legally bartered away. In 1891, when the deed in this case was given, the city of Spokane did not have the power of eminent domain (*Tacoma v. State*, 4 Wash. 64, 29 Pac. 847), and the agreement to refund any assessment could not be construed as a waiver of that power. The Michigan case does not, therefore, appear to be applicable on the question here involved. Had the city of Spokane had the power of eminent domain in 1891, a different question would be presented, upon which we express no opinion.

In *Vrana v. St. Louis*, the court treated the contract as one exempting property from taxation, and relied upon *State v. Hannibal & St. J. R. Co.*, 75 Mo. 208, in holding the exemption beyond the power of the city to make. In that case the court said in part:

"The city was without power to agree to exempt the lots in Allen's Western Addition either from general taxes or special assessments, because no such power is vested in it by its charter and unless this power is granted it does not exist.

"This must now be regarded as settled law in this state. It was so ruled in *State v. Hannibal and St. Joe R. R. Co.*, 75 Mo. 208, as to an attempted exemption by the city of Han-

nibal as to municipal taxes in order to prevent a removal of the general offices and machine shops of the railroad company. The reasoning of Sherwood, C. J., in that case leaves nothing to be added and decides the principle involved in this case. The charter of St. Louis does not contain any such power of exemption. Beach, in his work on 'Public Corporations,' referring to *State v. H. & St. Joseph R. R.*, *supra*, and many other authorities, state the result to be that 'a municipal corporation has no power to grant exemption from or a commutation of taxes, and a contract which undertakes to do so is void; nor can municipalities discriminate in favor of any property. The power to exempt is not included in the power to tax, but must be specifically conferred.' (2 Beach on Pub. Corp., sec. 1443.)

"One of the prime governmental duties imposed upon the city of St. Louis is to provide reasonable highways for the public of said city, and as compensation for private property taken for public use is required to be made out of public funds only so far as the public generally is found benefited, and the remainder is required to be provided by local assessments against the private property especially benefited, the city would put it out of its power to perform its obligation if it were allowed to exempt private property from such assessments. If it could exempt one man's property, it might exempt a dozen, and thus it might find itself unable to find property sufficient and not exempted out of which to pay for necessary improvements, or be driven to taxing a part of the property-owners far in excess of any fair benefit to their property, a practice not to be countenanced. Judge Elliott, in his admirable treatise on Roads and Streets, lays it down that: 'Where a statute provides generally for the assessment of lands for the cost of improving a road or street, it authorizes an assessment upon all lands within the limits designated, although some of the property may be exempt from taxation. A statute exempting property from taxation does not exempt it from an assessment for a local improvement. It may, indeed, be doubted whether a statute exempting from local assessment property appropriated to specific uses would be valid, since the exemption of one or more parcels would increase the burdens of others owning property along the line of the highway, and this would produce an inequality against

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which in many of the states constitutional provisions are directed.' (Elliott on Roads and Streets (2d ed.), sec. 549.)

"So that even if the city had made an express agreement with Thomas Allen to exempt the lots in said addition from future assessments for necessary public purposes, it would have been a void undertaking on its part, of which he was bound to have notice. In *St. Louis v. Meier*, 77 Mo. 13, this court said: 'Kingsland must be supposed to have known that he could not legally make, and that the city could not legally accept, a dedication made by him upon condition that when the city should condemn the land to the north and south of him he should not be assessed with benefits. Whether he would be liable to be assessed with benefits would depend upon the provisions of the city charter, and not upon the agreement of the parties. Besides, the owners of the land north and south of him could not, by any arrangement between him and the city, be made to bear any portion of the tax for benefits which would otherwise be chargeable against his property.' "

Rackliffe & Gibson v. Duncan followed the *Vrana* case on the same theory, but in *Miners' Bank v. Clark*, the court decided squarely that, even as a purchase of the easement, the method adopted was void. The material portion of that opinion follows:

"Appellant contends that by reason of the condition contained in the quit-claim deed from Clark to the city, dated June 21, 1901, the city had no right to improve said street at the expense of Clark, and that said deed being of record the contractor was charged with notice thereof, and the tax bills are therefore void. The determination of the proposition turns upon the answer to the following question: Did the city, by accepting the deed from Clark in 1901, contract away its right to later order said street improved at the expense of the abutting property owner, even though the grantor in said deed be the property owner when the improvement is later made? Unless the law constituting its charter gives such right, a city cannot contract away its right and power to levy special assessments for street improvements, and thereby create an exemption from such assessments. (*Vrana v. City of St. Louis*, 164 Mo. 146, where the exemption was attempted in the dedication; *Rackliffe & Gib-*

son v. Duncan, 130 Mo. App. 695, where the exemption was attempted in the deed conveying the street to the city.) The charter of cities of the third class does not give such power. In fact, the legislative right to give such power might well be doubted—a point, however, which we do not decide.

“It is true, as asserted by appellant, that a city of the third class may acquire title to land for street purposes; but we know of no rule which authorizes the city to surrender, as the purchase price of a street, its right to order that street improved in any manner authorized by law.”

The rule announced in Missouri has thus grown from the decision in *State v. Hannibal & St. J. R. Co.*, which was, as stated in *Vrana v. St. Louis*, an attempted exemption from municipal taxes. Prior to *Miners' Bank v. Clark*, the Missouri courts had considered the undertaking by the city only as an exemption, and not as consideration for a purchase of the property. In *Miners' Bank v. Clark*, the legality of the agreement as a purchase price was evidently not seriously considered. There appears to us to be a wide distinction between an exemption from taxes, such as was under consideration in the *Hannibal* case, and an agreement to refund assessments as the purchase price of an easement, a distinction which the Missouri courts did not consider; and we cannot avoid the conclusion that the later Missouri cases are decided on the basis of a case differing radically in principle from the question then before the courts. The Indiana case, being founded on the Michigan and the Missouri cases, likewise failed to note the distinction.

We may concede that the city's contention that it was without authority to enter into this contract is supported by some show of authority. The cases are, however, as we have shown, decided on what appears to us to be an erroneous application of the fundamental principle that exemptions from taxes are void. The cases of *Perth Amboy Trust Co. v. Board of Aldermen etc.*, 75 N. J. L. 291, 68 Atl. 84, and *Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091, although apparently decided without notice of the contrary rule, es-

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tablish what seems to us to be the more equitable doctrine. In the *Perth Amboy* case, the court says:

“The excuse of the city for levying the assessment in question in the face of the condition of dedication which it had accepted is that it had no power to accede to the condition upon which the land for Sheridan street was given by its owners to the public. The claim of the city is that the dedication should stand, but that the condition upon which it was made should be ignored. We cannot take this view of the legal situation. The condition, so far as it affected Sheridan street, being limited to a single expenditure for a specific purpose, was in effect the price the city was willing to pay for the land. If the city had power to buy the land at such sum, it had power to agree to expend such sum upon the land as the condition of its perpetual dedication to public uses. After the expenditure of the sum thus required the public have no more standing to exact payment from the abutting owners than the owners have to exact damages from the public for taking the land. Dillon, Mun. Corp. (3d ed.), § 632, and cases cited in the notes.”

The substance of *Omaha v. Megeath* is well stated in the syllabus:

“Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express conditions in the deed of conveyance, that the grantee should lay out and improve said strip as a street and forever after keep the same in good repair and order at its own expense, such city, for improving or keeping in repair such street, cannot require payment by its grantor because of their ownership of the aforesaid abutting property, and the same exemption from liability exists in favor of one who has since purchased a part of said abutting property.”

Under Laws of 1889-90, p. 219, § 5, subd. 6 (Rem. & Bal. Code, § 7507; P. C. 77 § 83), the city of Spokane had power to purchase private property for corporate purposes, and we see no evil in making the compensation to be paid dependent on a future contingency. The city has accepted the benefits from the deed and is seeking to escape the burdens. As

stated by Mr. Justice Strong in *Hitchcock v. Galveston*, 96 U. S. 341, the city "having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." At the time this deed was accepted, the city of Spokane had no power to condemn the property. *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847. The only power of acquisition besides an unrestricted dedication was that of purchase, and having entered into a contract which it had power to make and received the benefits, the city should now be estopped to question the legality of the mode of payment. In reaching this conclusion, we have not lost sight of our decisions in *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836; and *Turner Inv. Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426, 41 L. R. A. (N. S.) 781. In those cases the contracts were entirely *ultra vires* and void, whereas here, the most that can be said is that the mode of payment provided for was not specifically authorized.

The only remaining objection to a reimbursement by the city is the contention that the covenant was enforceable, if at all, only by the grantor and not by its successors. In *City of Omaha v. Megeath*, *supra*, the court allowed the successors of the grantor the benefits of the covenant as a matter of course. In this case, there is an added reason found in the deed itself for holding that the right to reimbursement passed to the successors of the grantor. The grantor covenants that it would build all structures in the river of fireproof material, and this covenant was expressly extended to its assigns. The city also covenanted that it would make certain approaches from the abutting land to the street. This latter covenant clearly could benefit only the owner of the land when the street was graded, and it would be unconscionable to hold the grantor to the covenant on its part and allow the city to escape liability because the title to the land had passed from the grantor to other persons. The judgment is reversed,

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Syllabus.

and the cause remanded with directions to the trial court to enter judgment for the appellant for that portion of the assessment paid by it for the embankment, retaining wall, curbs and curb armor, catch basins and drain pipe, together with such portion of the cost of incidentals, engineering, and superintendency as entered into the grading complete with curbs and gutters.

FULLERTON, MAIN, and ELLIS, JJ., concur.

[No. 12500. Department Two. January 10, 1916.]

ADALINE DONALDSON, *as Administratrix etc., Respondent*, v.
GREAT NORTHERN RAILWAY COMPANY, *Appellant*.¹

APPEAL—REVIEW—VERDICT. Upon conflicting evidence supporting either side, the verdict of a jury is conclusive, regardless of the weight of the evidence.

MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE — PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY. The evidence of a dozen experts who stated positively that the conditions after a boiler explosion showed conclusively that the explosion was caused by low water does not conclusively establish the same as a scientific fact, where their statements were only opinions drawn from previous experience; and the question is one for the jury where the fireman, the only one in a position to know positively whether there was water in the boiler, testified that the water glass showed sufficient water to prevent an explosion.

SAME—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for the death of an engineer through the explosion of a locomotive boiler, it is for the jury to determine whether the railroad company was guilty of negligence in converting a coal burning locomotive into an oil burner without changing button head bolts or using fusible plugs, and as to the presence or absence of scale on the crown sheet, where there was evidence that button head bolts had a tendency to become overheated by an oil flame, and taper heads were used on oil burners, and that fusible plugs were a means of preventing explosions.

¹Reported in 154 Pac. 133.

APPEAL—REVIEW—TRIAL—MISCONDUCT OF COUNSEL—INVITED ERROR. In an action for the death of a locomotive engineer under the Federal employers' liability act, it is not misconduct on the part of plaintiff's counsel warranting a new trial that he offered in evidence the report of Federal inspectors, which, by 36 U. S. Stat. at L. 916, is made inadmissible for any purpose in any suit, where the defendant's counsel, in his opening statement, explained the making and publication of such reports and stated that plaintiff had access to the report and could produce it, if they desired, as correct; since the production was challenged and the error invited.

DEATH—DAMAGES—EXCESSIVE VERDICT. A verdict for \$8,500 in favor of a mother for the death of a son is not excessive, where he was a locomotive engineer earning about \$175 a month, living with his mother and furnishing \$75 a month to maintain the home kept for him by her, and had expressed his intention of not marrying as long as his mother lived.

JURY—RIGHT TO JURY TRIAL—FEDERAL CONSTITUTION. The seventh amendment to the Federal constitution relative to trial by jury does not apply to trials in state courts; and hence, in an action in a state court under the Federal employers' liability act, a verdict agreed to by ten jurors does not violate rights under the Federal constitution.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered August 3, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

F. V. Brown and *F. G. Dorety*, for appellant.

Higgins & Hughes and *James McCabe* (*Hyman Zettler*, of counsel), for respondent.

PER CURIAM.—This is an appeal from a judgment for the plaintiff entered after denial of motions for judgment *non obstante* and new trial, upon the verdict of a jury in an action brought under the Federal employers' liability act, to recover damages for the death of her son, Vance H. Thoms, which she alleged was due to the negligence of the appellant.

On November 5, 1913, Thoms was an engineer in the employ of the appellant, and was on that date operating engine No. 1,902, which was one of three engaged in hauling a freight train between Skykomish and Scenic. When near

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the station at Tonga, the boiler exploded and Thoms was killed. It is admitted that engine No. 1,902 was originally a coal burner and, several years prior to the accident, had been changed into an oil burner. When equipped as a coal burner, the stay bolts, which extend from the main shell through the water space and support the crown sheet, were secured to the latter by button heads, as is customary in coal burners. When the change was made from coal to oil, these bolt heads were not changed. Whether the explosion was due to this fact is a principal ground of controversy.

The appellant and the respondent each have an explanation of the cause of the explosion. The respondent asserts that it was due to the use of button head instead of taper head bolts on an oil burner; that it was due to the lack of fusible plugs, and to an accumulation of scale on the crown sheet; all of which it is alleged was due to negligence of the appellant. Appellant contends that the explosion was due entirely to low water in the boiler, which was solely the negligence of the deceased. Testimony was introduced in support of each theory, and there is thus presented a direct conflict in evidence on which the verdict of the jury, if the question was properly submitted, is conclusive, regardless of our own opinion as to weight of the evidence. *Parker v. Washington Tug & Barge Co.*, 85 Wash. 575, 148 Pac. 896; *Lombardi v. Bates & Rogers Construction Co.*, 88 Wash. 243, 152 Pac. 1025. Ordinarily we will not, under such circumstances, review the record further than to discover whether there is evidence to support the verdict, and having found such evidence, we will accept the verdict as conclusive. However, the appellant urges that the evidence presented by the respondent is so meager, unreliable, and lacking in probative value, and the evidence opposing it in such preponderance, that the denial of the motion for judgment *non obstante veredicto* or for new trial was an abuse of discretion on the part of the trial court. The amount of the verdict and the seriousness with which appellant argues the point, coupled

with the somewhat novel character of the grounds urged and their evident importance to appellant, have impelled us to give as briefly as possible the reasons why we are unable to accede to the arguments advanced.

The essence of appellant's contention is that the condition of the crown sheet, bolts and flues after the explosion shows conclusively as a scientific fact that the explosion could not have been due to any other cause than low water. Appellant introduced the testimony of over a dozen boiler makers, master mechanics, boiler inspectors and others, all of whom stated positively that the conditions after the explosion conclusively showed low water as the cause. We do not agree, however, that this testimony established undisputed scientific facts. The evidence at best was of a negative character, and the statements of the witnesses were their opinions drawn from their previous experiences. Because they had never known the conditions shown here to occur except from a low water explosion, they concluded that they could not result otherwise.

On behalf of the respondent, one Hanson, fireman on the engine when the explosion occurred, testified positively that the water glass showed sufficient water on the crown sheet to prevent an explosion. An effort was made to impeach this testimony by introducing a statement prepared by the attorneys for appellant and acknowledged as correct by Hanson while he was in the hospital after the explosion. Hanson denied any knowledge of this statement, claiming that he was unconscious for days after the explosion, and had made no such statements at any time. The credibility of his testimony was clearly for the jury. We have, then, the evidence of the only witness who was in a position to know positively whether there was water in the boiler, to the effect that the water glass indicated sufficient to prevent a low-water explosion. Opposed to this is the testimony of a large number of capable experts that the explosion could have been due only to low water. Under such conditions, it was clearly competent for

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the jury to determine that the testimony of Hanson was entitled to greater weight than that of appellant's witnesses. We conclude that, on this ground, appellant was not entitled to judgment, and that the denial of a new trial was not an abuse of discretion.

Appellant contends that, even if it be found that the evidence of low water was a question for the jury, nevertheless the evidence did not show any negligence on the part of the appellant. Coupled with this contention is an attack on the character of respondent's expert testimony. The contention is not made that there was a total lack of evidence of negligence, and there being some evidence that the button head bolts have a tendency to become overheated by an oil flame and allow the crown sheet to give, which would result in an explosion, it was for the jury to say whether their use under such circumstances was negligence. Likewise, as to the use of fusible plugs as a means of preventing explosions and as to the presence or absence of scale on the crown sheet. The reliability of respondent's witnesses and the sufficiency and consistency of their testimony are all questions which the verdict precludes us from reviewing.

The most serious contention, aside from the question of evidence just discussed, is a claim that a new trial should be allowed because of misconduct of respondent's counsel in questioning appellant's witness Dowling, superintendent of safety for the Great Northern, concerning the report of the Federal inspector on this accident. The use of these reports or any part thereof "for any purpose, in any suit or action for damages growing out of any matter mentioned in said report or investigation," is, by statute, 36 Stat. at L. 916, made unlawful. During the cross-examination of the witness, counsel for respondent asked him whether he considered the government inspectors were wrong in their conclusions, if their report on the accident stated that certain conditions found after the explosion could not have resulted from a low-water explosion. After the examination had proceeded for

some time and the witness had had several features of the report stated to him and had been asked his opinion as to the worth of the conclusions, appellant's counsel objected to the line of cross-examination, but did not base the objection on the inadmissibility of the report. Respondent's counsel was stopped; whereupon he attempted to put the report in evidence. The offer was refused. Under the Federal law, the report was absolutely inadmissible, but we do not believe that appellant is in a position to complain of the conduct of respondent's counsel in asking the witness about the report. In his opening statement, appellant's counsel stated to the jury: "We will show that whenever an accident of this kind happens it is reported to the United States government and an inspection is made and reports printed and published, and the data is available so that the plaintiffs can have access to it and produce it if they so desire, as correct." Respondent was justified in construing this as a challenge to produce the report. The fact that the error, if any, was thus invited by appellant, and his failure to object on the ground of the inadmissibility of the report until the harm, if any, had been done, force us to the conclusion that appellant cannot now complain that he was prejudiced by the action of respondent.

The verdict awarded respondent \$8,500. Appellant now contends that this amount is excessive and conclusive proof that it was influenced by passion and prejudice. At the time of his death, the deceased was earning about \$175 per month. He was living with his mother and furnishing \$75 per month or more to maintain the home kept for him by her. He had expressed his intention of not marrying as long as his mother lived. The income from this verdict well invested would not enable the respondent to live in better circumstances than those to which she was accustomed during her son's life, and in view of her possibly greater needs during her declining years, we do not find the verdict excessive. As one of the grounds for a new trial, appellant introduced affidavits to

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the effect that respondent had previously supported herself and had other means of support. We do not find, however, that there was an abuse of discretion in denying a new trial on these grounds.

Appellant contends that the instruction that an agreement by ten jurors would be sufficient is in violation of the seventh amendment to the constitution of the United States, which has been generally construed to contemplate a trial by twelve jurors. It is, however, well settled that this amendment does not apply to the states, and that the verdict in an action in the state court under the Federal employers' liability act is controlled, not by the provision of the national constitution, but by the laws of the state where the suit is pending. The authorities are collated, and the rule well stated, in Roberts, *Injuries to Interstate Employees*, p. 312, § 176.

Several other grounds of error are urged in the request for a new trial. These have all been considered without convincing us that there is error warranting a new trial of this case.

The judgment is therefore affirmed.

ON REHEARING.

[Decided March 4, 1916.]

PER CURIAM.—Appellant has filed a petition for a rehearing, which, after due consideration, is denied. Our attention, however, is called to a stipulation entered into in connection with a motion to strike respondent's brief because of failure to file in time, and because of which the case was not heard here until the May, 1915, term. The stipulation provides that, if the judgment be affirmed, the interest accruing during the period of continuance might be eliminated from the judgment, in case the court should determine such a condition a proper one in denying the motion to strike the brief. This stipulation was overlooked in writing the opinion, although we had it in mind in reaching our conclusion, and intended to give effect to it. Not having done so in the opinion, we do so now. The opinion is modified to this extent: The

judgment will not bear interest from March 1, 1915, to June 17, 1915. In all other respects, the judgment will stand.

[No. 12658. Department One. January 10, 1916.]

In the Matter of the Estate of EDWARD CONNOLLY.

JOHN FARLEY *et al.*, Respondents, v. JAMES HOPKINS,
*Executor etc., Appellant.*¹

WILLS—SIGNATURE—FORGERY—EVIDENCE—SUFFICIENCY. Findings that the signature to the alleged will of an illiterate man was a forgery are sustained, where the experts were of that opinion, and an admitted signature, superimposed upon the challenged signature, was exactly similar, showing that the latter was undoubtedly a tracing from the genuine.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be disturbed when not against the preponderance of the evidence.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 26, 1914, upon findings in favor of the plaintiffs, in a will contest, tried to the court. Affirmed.

Lucius G. Nash and Nuxum, Clark & Nuxum, for appellant.

Tolman & King and Luby & Pearson, for respondent Farley.

John B. White and Fred J. Cunningham, for respondent State of Washington.

MOUNT, J.—The purported will of Edward Connolly, deceased, is contested by one asserting himself to be an heir, and by the state of Washington. The case took the usual turn of such cases, and there is much conflict of testimony.

After very thorough inquiry, the trial judge found the will to be a forgery, and held, further, that the right of the state to claim the property under the laws providing for the

¹Reported in 154 Pac. 155.

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escheat of property of deceased persons would not be prejudiced by his holding. The witnesses to the will testified that it was executed by the deceased, and its whereabouts is accounted for by the testimony of other witnesses from about the time it was executed until it was offered for probate. On the other hand, there is testimony tending to show that the deceased had not executed a will, and that he had manifested an intent not to do so.

Several experts in handwriting were offered as witnesses and they concur in the opinion that the purported signature to the will is a forgery. The fact that the experts agree in this case may be attributed to the unusual instance that they were all testifying on the same side of the case. At least two men who were familiar with the signature of the deceased, and with the deceased and his characteristics, expressed the opinion that the signature was that of Edward Connolly.

We have read the whole of the record with more than our usual care, keeping in hand the several exhibits to which the witnesses were addressing their testimony. We have made the same examinations and comparisons in the same way and with the same instruments employed by the expert witnesses, and but for the fact that there was offered by the proponents of the will an admitted signature of Edward Connolly, and which became the principal basis for comparison, we would be inclined, notwithstanding the opinion of the experts, to hold that the signature to the will is genuine. But when the two signatures, the one upon the will and the one referred to as exhibit No. 7 are considered, we believe, as the court below must have believed, that the signature upon the will is a tracing of the genuine signature. Edward Connolly was not a man of education, nor was he given much to writing.

It is understood of all men that no two signatures are exactly alike, or so nearly alike that they will bear a superimposition of one upon the other, and if they do, it is one of the strongest evidences of a forgery.

The subject of identity of signatures and the conclusions to be drawn therefrom are learnedly discussed by Mr. Osborn in his finished work on Questioned Documents, ch. 16. After noting that it is the natural thing for the model to go undiscovered, he says: "Strange as it may seem, however, in many important cases the model writing is actually put in the case to prove the forged writing to be genuine by means of it." It has so happened in this case. We have the model—the authenticated signature—and the questioned signature. All the books agree that if exactly similar they will prove too much.

"This coincidence of a disputed signature with a genuine one when superimposed against the light has long been held by the courts to be proof of simulation." *In re Burtis' Will*, 43 Misc. Rep. 437, 447, 89 N. Y. Supp. 441, 447.

"That an illiterate man, capable of writing his name, . . . could, without tracing and painstaking design, produce two signatures so precisely alike," is deemed incredible. *In re Koch*, 33 Misc. Rep. 153, 68 N. Y. Supp. 375.

"It is a fact well known, and may be readily verified, that no two signatures, actually written in the ordinary course of writing them, are precisely alike. The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent. But the coincidence is seldom, if ever known, where a genuine signature of a person, when held up to the window pane, superimposed over another genuine signature of the same person, is such a *facsimile* that the one is a perfect match to the other in every respect. . . .

"But where two or more supposed signatures are found to be counterparts, I think the simulation is detected by that circumstance. Genuine signatures will not lap with perfect similarity one over another." *Hunt v. Lawless*, 7 Abbott, New Cases, 113, 119.

"It does not seem hardly possible that one, without design, can write his name twice so exactly alike, in spaces between and height of the letters, and their slope or angles, as that a tracing of one will accurately measure the other in every respect. Indeed, numerous experiments show that it cannot

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be done when it is sought to be done. Such a perfect coincidence as in the case of these two signatures in this cause is at least highly improbable, and but barely possible, if attainable at all." *Day v. Cole*, 65 Mich. 129, 31 N. W. 823.

And so conclusive is this circumstance that at least one court has followed it to the exclusion of other evidence.

It is said:

"And for this reason it does not need the testimony of experts to demonstrate that these signatures were not genuine, but tracings. The resemblance in each is so striking that it cannot help but be observed upon a bare inspection, and if a measurement be made from any given point in one, it will be found to correspond to the merest fraction of an inch in the other; in other words, each signature will superimpose the other, a similarity which does not appear in the concededly genuine signatures introduced in evidence, and which from the very nature of things could not occur." *Matter of Rice*, 81 App. Div. 223, 81 N. Y. Supp. 68.

We have not overlooked the point that is made that the will antedates by three months the authenticated signature to which we have referred, but we are mindful that it is not likely that one who is disposed to forge a signature would hesitate to endeavor to discount or destroy the evidence of his forgery by dating the forged instrument upon a day when the signature relied upon as a copy was not in existence. In short, the testimony is conflicting. We have weighed it carefully and we think that the findings and decree of the trial judge are sustained by a preponderance of the evidence. We have come to this conclusion, endeavoring in our own minds to reject entirely the testimony of two of the principal witnesses for the contestants, that is to say, Stephen Doyle and George Morris. The testimony of these witnesses is vigorously assailed by counsel. We believe ourselves that their testimony is so freighted with fabrication as to make them unworthy of belief.

There is no question of law in this case. The trial judge had the advantage of seeing and hearing the witnesses and of

marking their demeanor while upon the witness stand. We find nothing that would sustain a holding that the preponderance of the evidence is not with the contestants.

The decree of the lower court is affirmed.

MORRIS, C. J., ELLIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 12925. Department Two. January 10, 1916.]

*In the Matter of the Estate of SARAH A. BUCHANAN,
JAMES BUCHANAN, as Administrator etc.,
Appellant.¹*

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal when it cannot be said that the evidence preponderates against them.

HUSBAND AND WIFE — COMMUNITY PROPERTY — SEPARATE FUNDS— PROFITS AND GAINS — CONFUSION WITH EARNINGS. Findings that profits and gains of separate funds were so intermingled and confused with community earnings as to make the net result, after ten years, the community property of husband and wife, are sustained, where it appears that, at about the time of their marriage, \$500 of separate funds of the wife and \$400 of separate funds of the husband were invested in nine shares of the capital stock of a lumber company, which was thereafter managed by the husband as a close corporation, and operated much as a partnership, and successfully financed at the start largely through personal loans, and by profits and gains, increasing in value in ten years twenty-fold, largely through the personal efforts of the husband, who held one-half of the outstanding stock of the corporation at the time of the death of the wife under circumstances justifying the conclusion that his skill and efforts contributed much more to the profits and gains of the corporation and growth of its business than the relatively small investment at the inception of the enterprise; especially when taken in connection with the impossibility of ascertaining the true proportion of such original investment in the value of the capital stock at the time of the wife's death.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered March 29, 1915, upon find-

¹Reported in 154 Pac. 129.

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ings in favor of the petitioner, in an action to subject property to administration as part of a community estate, tried to the court. Affirmed.

F. D. Oakley, for appellant.

Burkey, O'Brien & Burkey, for respondent.

PARKER, J.—This is a proceeding in the administration of the estate of Sarah A. Buchanan, deceased, wherein Earl McCoy, a son and heir of deceased, seeks to have brought into the estate, and administered as part thereof, certain property which he claims was the community property of his deceased mother and her husband, James Buchanan, at the time of her death, which property James Buchanan claims as his separate property, and that it is therefore not subject to administration as part of the estate of the community. The relief prayed for by Earl McCoy is, in substance, that James Buchanan, who is the administrator of the estate of deceased, be required by the court to inventory this property and administer the same as the property of the community which was dissolved by the death of Sarah A. Buchanan. Issues were joined and trial had upon the merits, before the superior court without a jury, resulting in findings and judgment as prayed for by Earl McCoy, from which James Buchanan, both personally and as administrator, has appealed. The principal question, and the only one which we deem it necessary to here notice, is, Was the property the community property of deceased and James Buchanan at the time of her death?

The trial court made findings covering the facts in considerable detail. Contention is made in behalf of appellant that these findings are not in accordance with the evidence in a number of particulars. Because of the nature of the case, we have deemed it wise to look to the evidence as found in full in the statement of facts as certified by the court, rather than to the abstracts thereof prepared by respective counsel, in which they seem to be at variance. We have, therefore, read

all of the evidence as found in the statement of facts, and are convinced therefrom that we should now take the same view of the facts as the trial court did, especially since the court's conclusions rest largely upon the oral testimony of witnesses whose credibility is involved. In other words, we cannot say that the evidence does not preponderate in favor of the court's findings. We shall not analyze the evidence here, but state the facts, in substance, as found by the trial court, and some additional facts which we think the record shows and are worthy of note. The quotations in our statement following are from the findings.

Sarah A. Buchanan was married to James Buchanan on April 15, 1901. She was then a widow and had five children living, one of whom was Earl McCoy, the petitioner in this proceeding.

"Shortly prior to her marriage to James Buchanan and in January, 1901, the deceased sold a timber claim then owned by her as her sole and separate property, and received therefor the sum of approximately \$885, over and above all sums necessary to pay encumbrances upon said property, and that prior to her marriage she was the owner of the furniture in the hotel known as the Brunswick Hotel, located on East 25th and D streets, in the city of Tacoma; that said hotel had from thirty to thirty-six rooms furnished, and the furniture was worth from five hundred to six hundred dollars; and that just prior to her marriage, the deceased sold the furniture, the exact amount which she received therefor being unknown to the court.

"Prior to his marriage to deceased, James Buchanan had been a laborer working in various saw-mills in the state of Washington and British Columbia for a period of about four years and had saved but little if any money. James Buchanan and one Clinton McDaniel, in April, 1901, executed articles of incorporation of the Puget Sound Lumber Company, the same being filed on April 11, 1901. On April 13, 1901, James Buchanan paid into the treasury of the said company \$600 in payment for six shares of its capital stock, and deceased and James Buchanan then went to Victoria, British Columbia, and were married on April 15, 1901, and continued to live

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together as husband and wife until her death. Three hundred dollars additional was paid in by James Buchanan in payment of three additional shares of stock in said company in August, 1901, and in July, 1902.

"James Buchanan, at all times after the mill was put into operation and until the death of his wife, Sarah A. Buchanan, devoted his entire time and attention to work in connection with the operation of said mill. Of the sum of \$900 in money paid for said stock, \$500 or more of the same was paid with money furnished by the deceased, and not more than \$400 of said money was furnished by the said James Buchanan. The money furnished by the deceased and paid in payment for stock on April 18, 1901, was furnished by the deceased in contemplation of an immediate marriage with the said James Buchanan and for the purpose of helping finance the said lumber company as a community enterprise, and the remaining money was paid for the same purpose. The said lumber company was financed to a large extent by borrowed money raised from notes signed by the corporation and by the members thereof, including James Buchanan; and largely by the use of money so borrowed, the original mill was practically rebuilt or changed several times, greatly increasing its value and capacity, and one time, after it had been destroyed by fire, it was entirely rebuilt, partly from money collected from insurance and partly from money so borrowed.

"The capital stock of said company was divided into fifty shares of the par value of \$100 each, and about the year 1909, 16 $\frac{2}{3}$ shares had been issued and stood in the name of James Buchanan, 16 $\frac{2}{3}$ shares had been issued to, and stood in the name of, Wade Hampton, and 16 $\frac{2}{3}$ shares had been issued and stood in the name of E. V. Wintermote, who had purchased the stock formerly owned by Mr. Daniel, and that about said time James Buchanan and Mr. Wintermote purchased the stock of Mr. Hampton for \$17,000, paying him therefor in cash out of the corporate funds, but that at said time Mr. Hampton delivered his certificates of stock to the officers of the company, and since said time no transfer has been made of said certificates, and at the time of the death of said deceased and continuing to the present time, all of the outstanding stock was owned by the community composed of Mr. Buchanan and the deceased owning one-half thereof and Mr. Wintermote owning the remaining one-half.

“Through the money borrowed on the credit of James Buchanan and the other members of the said lumber company while the deceased and James Buchanan were husband and wife, and through the work, energy and skill and management of the said mill by the said James Buchanan and his associates during the time that Mr. Buchanan and said deceased were married, the said mill plant and equipment increased many times in value; a dividend of thirty per cent upon the capital stock was declared in 1905, and the same amounting to \$500, was credited to the account of James Buchanan upon the books of the company in the same account in which the salary account of Mr. Buchanan was credited, and out of this fund the community expenses of the deceased and Mr. Buchanan were paid.

“Deceased and James Buchanan did not in their lifetime treat said property as the separate property of either of them, but as their community property, and when compared to the value of said mill plant at the time of the death of deceased, the original investment in said stock was so small and its part in creating the final result was so uncertain and insignificant that, taken in connection with the impossibility of ascertaining its proportion in the value of the capital stock or of said mill at the time of her death, and the fact that the salary of the said James Buchanan in conducting said mill and the dividends derived from said stock were intermingled, whatever of separate funds entered into said property was so intermingled with the community property as to have lost its identity and separate character, and all of said stock and all interest in the said mill plant constituting a one-half interest therein was the community property of the said deceased and Mr. Buchanan at the time of her death.”

We do not overlook the fact that the conclusions of the court as to the property being community property, in the above quoted portions of the findings, can hardly be regarded as findings of fact, but rather as conclusions of law. We therefore do not adopt them as findings of fact. Sarah A. Buchanan died April 12, 1911, within three days of ten years after her marriage to James Buchanan. Thereafter James Buchanan was duly appointed administrator of her estate and that of the community which was dissolved by her death.

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The facts above summarized are gathered from the findings of the court. There are other facts shown by the record which we deem also worthy of note here, as follows: The Puget Sound Lumber Company was, during the lifetime of Sarah A. Buchanan, what might be designated a close corporation, its stock being owned by those very few persons, who were actively engaged in promoting its business. Indeed, when the manner of its operation and financing is considered, it might be said to have been operated much as a partnership, though it can hardly be said that it was not technically a corporation. James Buchanan was at all times its active manager and one of its principal officers; and while he received a salary, as appears from the books of the company, the growth of its business and the accumulation of its property was manifestly the result of his personal efforts, apparently, more than that of any one else, and in any event, much more than the result of the small amount of capital invested at the beginning by himself and wife. He was manifestly more than a mere employee for wages or salary. His whole attitude and demeanor towards the business of the company points to his efforts in its management as being more for the purpose of making money as a part owner thereof than as being interested only in receiving wages or salary for his work as an employee. The property here involved is a one-half interest in this corporation, its business and property, in so far as such interest is evidenced by one-half of the capital stock thereof standing in the name of James Buchanan. Of course, this stock is personal property, and it may also be noted that the property of the corporation is now, and at all times has been, substantially all personal property. Some of these facts may seem irrelevant, but we think none of them are wholly so, in view of the involved nature of our problem.

Counsel for appellant rely upon that line of decisions holding that the status of property as to its being community or separate is determinable from its status at the time of its

acquisition by either member of the community, and that its "rents, issues and profits" go to its owner. Counsel proceed upon the theory that this stock was the separate property of appellant in the beginning because of his claimed ownership of the money which then purchased it, and that its increased value because of the growth of the business and property of the Puget Sound Lumber Company also became his separate property. In this behalf our attention is called to the decisions of this court in: *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677; *Harris v. Van De Vanter*, 17 Wash. 489, 50 Pac. 50; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; *Guye v. Guye*, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186; *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033, and *In re Deschamps' Estate*, 77 Wash. 514, 137 Pac. 1009, which decisions have to do with real property, the increased value thereof during coverture, and crops raised thereon; and also with live stock and their natural increase. The theory and nature of counsel's argument is evidenced by their quotations from our decision in *Guye v. Guye*, *supra*, at page 348, as follows:

"Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed, should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically three hundred and fifty thousand dollars since the marriage of the appellant and Francis M. Guye, and contend that it is property acquired during marriage within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues, and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So, also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part

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community. And so, again, property that is separate property today might be mixed property tomorrow, and on the next day again be separate property, owing to its fluctuation in value. We cannot think this the meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

We are unable to gather from these observations of the court any rule more favorable to counsel's contention than that specific real or personal property once becoming separate property remains so, unless by voluntary act of the spouse owning it its nature is changed. But this, it seems to us, does not solve the question of when profits or gains resulting largely from personal efforts of one of the spouses become separate or community property. It is by no means always clear that such profits and gains are or are not rents, issues and profits of separate property, though separate property may have, in a measure, contributed to such gains.

The property here involved is not real property; nor do we think that the original investment, from which in a measure it comes, was in any event at the beginning more than four-ninths the separate property of appellant, five-ninths at least being the then separate property of deceased. Nor can we concur in the view that the same twenty-fold increase in value of this original investment resulted as a natural increase apart from the personal efforts of appellant while a member of the community. We are constrained rather to the view that such change, increase and growth in the business and its property was very much more the result of the personal efforts of appellant during the ten years of his married life, in the performance of which he was the servant of the community. As we view it, we are then confronted with the question, What was the principal producing cause of these profits and gains? This may not be a very exact or satisfactory rule of determining whether

property is community or separate. But where a small original investment of separate funds is united with the personal efforts of a member of the community, and therefrom profits and gains to the extent of some twenty-fold are returned, the property being personal and undergoing many changes, we know of no other rule by which the question of such gains being community or separate property can be determined other than by taking into account the relative contributing force of the original investment and the personal efforts of a member of the community. The authorities do not furnish us much light upon this question, in so far as decisions directly in point are concerned. However, in *Yesler v. Hochstettler*, 4 Wash. 349, 366, 30 Pac. 398, observations were made by Judge Stiles, speaking for the court, quite in harmony with this view as follows:

“In this case the land purchased with the borrowed money paid for itself, and a large profit in land and money besides. It was a speculation purely personal in which the energy, skill and business prudence of Mrs. Yesler certainly were greater factors than the credit given by the mortgage of her land. But these mental forces, whether of husband or wife, are servants of the community, and their products are its property, to be shared in equally by the members of the community, and to follow the channels of devise and descent provided by the statute.”

In *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74, the question was presented somewhat as it is here, and was reviewed at some length. Justice Leonard, speaking for the court, observed:

“And in this or any other case, if profits come mainly from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community. It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other

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method of determining to whom the profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests, the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone."

The following decisions, while not directly in point, we think lend support to this view: *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452; *Bogges v. Richards' Adm'r*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. 938, 26 L. R. A. 537; *Penn v. Whitehead*, 17 Gratt. (Va.) 508, 94 Am. Dec. 478; *Glidden, Murphin & Co. v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98.

It may also be said that our decision in *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673, and decisions therein noticed, are in harmony with our conclusions here reached touching the question of investments of funds borrowed during coverture becoming community property though borrowed upon the credit of one spouse, the theory being that such gains are the product of community individual efforts.

These observations, we think, in any event, lead to the conclusion that the gains and profits produced by the personal efforts of appellant, though added to, in a measure, by the original investment, become community property. We agree, however, with the trial court that the funds, though at the beginning separate property of appellant and Sarah A. Buchanan, in the proportion of four-ninths and five-ninths, which purchased the stock in the first instance, have during the ten years of coverture become so intermingled with community property and lost their identity as separate property that all of the stock and interest in the Puget Sound Lumber Company, standing in appellant's name, became the community property of appellant and his deceased wife, Sarah A. Buchanan.

The proper disposition of the case is fraught with great difficulty, but upon the whole record we cannot escape the conclusion that the trial court properly disposed of the rights of the parties, and that its order and judgment must be affirmed. It is so ordered.

MORRIS, C. J., MAIN, HOLCOMB, and MOUNT, JJ., concur.

[No. 13202. *En Banc*. January 10, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Harold B. Gilbert, Prosecuting Attorney of Yakima County, Appellant, v. W. L. DIMMICK et al., Respondents.*¹

COUNTIES—OFFICERS—VACANCIES. Const., art 11, § 6, providing that the board of county commissioners in each county shall fill all vacancies occurring in any county has no application to the filling of vacancies in the office of county commissioners where all three of the county commissioner's offices are vacant.

COUNTIES—COUNTY COMMISSIONERS—VACANCIES — APPOINTMENT—POWER OF LEGISLATURE—GOVERNOR—STATUTES. It being necessary to prevent an entire cessation of county government through the vacancy of all the offices of the county commissioners, in the absence of any constitutional provision covering such contingency, the power is necessarily lodged in the legislature; hence the governor may fill two of three such vacancies, under Rem. & Bal. Code, § 8988, providing that, when, during a recess of the legislature, a vacancy occurs in any office the appointment of which is vested in the legislature, the governor shall fill such vacancy by appointment.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered November 11, 1915, upon findings in favor of certain defendants, in *quo warranto* proceedings, after a hearing before the court. Affirmed.

Harold B. Gilbert, for appellant.

Snively & Bounds, for respondents.

MOUNT, J.—This is a proceeding in *quo warranto* to determine which of two sets of persons claiming to be county

¹Reported in 154 Pac. 163.

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commissioners of Yakima county are entitled to hold such office. The trial court concluded that the respondents W. L. Dimmick, W. E. Coumbe, and Yancey Freeman were the legally qualified commissioners, and entered a judgment to that effect. The relator has appealed therefrom.

The facts are not in dispute. It appears that, prior to October 6, 1915, J. Lancaster, J. Stuart, and William Stahlhut, were the duly elected and qualified commissioners of Yakima county. On that day a recall election was held in compliance with ch. 146 of the Laws of 1913, p. 454 (3 Rem. & Bal. Code, § 4940-1 *et seq.*), and these officers were all recalled. Under the provisions of § 13 (Id., § 4940-13) of that act, the offices of all three of the county commissioners became vacant. Thereupon the governor appointed Messrs. Dimmick and Coumbe as commissioners for the first and second districts. These officers then qualified, and appointed Mr. Freeman as commissioner of the third district. Mr. Freeman thereupon qualified as county commissioner.

The question in the case is whether the governor, under the constitution and laws of the state, was authorized to appoint these commissioners in the place of those recalled. Section 13 of ch. 146 of the Laws of 1913, p. 461 (Id., § 4940-13), after providing that after the recall of such officers and the vacancy of the offices caused thereby, provides,

“And such vacancy shall be filled in the manner provided by the constitution and the laws of the state of Washington, or the charter and ordinances of the municipality, as the case may be.”

The constitution, § 6 of article 11, provides:

“The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified.”

It is apparent that this section does not control in this case, because at the time of the appointment by the governor,

the offices of all three of the commissioners of Yakima county were vacant on account of the election of October 6, 1915. There is no other provision of the constitution directly referring to the manner in which the office of county commissioners may be filled when all of such offices become vacant at one time.

In the case of *State ex rel. Pendergast v. Fulton*, 37 Wash. 271, 79 Pac. 779, where one vacancy had occurred, and the legislature had passed an act authorizing the judge of the superior court to act with the remaining members of the board of county commissioners, it was held that the act was in violation of the provisions of the constitution above quoted, and that it was the duty of the remaining commissioners to fill the vacancy.

The constitution, at § 5 of article 3, provides as follows:

“The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.”

Section 13 of that article provides:

“When, during a recess of the legislature, a vacancy shall happen in any office the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.”

The legislature of 1890 passed an act relating to the general powers and duties of the governor, Rem. & Bal. Code, § 8988 (P. C. 485 § 185), which provides:

“In addition to those prescribed by the constitution, the governor has the power and may perform the duties prescribed in this and the following sections:— . . . (2)— To see that all offices are filled, and the duties thereof performed, or in default thereof, apply such remedy as the law

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allows; and if the remedy is imperfect, acquaint the legislature therewith at its next session."

It is contended by the respondent that the provision in § 5 of art. 3 of the constitution, above quoted, that the governor "shall see that the laws are faithfully executed," is sufficient to authorize the appointment of county commissioners under the circumstances in this case; and that § 13, to the effect that when, during a recess of the legislature, a vacancy shall happen in any office, the appointment to which is vested in the legislature, the governor shall fill such vacancy by appointment, is sufficient to authorize the appointment. We think it is not necessary to enter into a discussion as to the proper construction of these two constitutional provisions. We think it is plain that if the legislature was in session, and a vacancy should occur in a county office for which the constitution made no provision to fill, that the legislature might fill such vacancy.

In the case of *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717, this court held that the legislature in the creation of a new county might authorize the governor to appoint commissioners for the new county, and that such authorization was not in contravention of the constitution. It follows from that decision that if all the commissioners of a county are recalled, or for some reason all three of the commissioners' offices should become vacant, upon the happening of some contingency, the legislature would clearly have a right by legislative act to authorize the governor to fill such offices by appointment on account of the emergency.

The county commissioners of a county are the business agents of the county, and the ordinary business of a county cannot be conducted without their authorization. It follows that when all the offices of county commissioners in a county become vacant, there is necessarily a cessation of county government, and there must be some power lodged somewhere to prevent such hiatus. This has been done by the legislature.

The act of 1890, above referred to, provides that, in addition to the powers prescribed by the constitution, the governor has power "to see that all offices are filled, and the duties thereof performed." We think it is plain that the legislature had the right to pass this act, and that, where there is no provision in the constitution for the appointment of commissioners of a county, and where a majority of the offices of the board of county commissioners become vacant, then it is within the power of the governor to fill such vacancy by appointment. This seems so clear that it is not necessary to further inquire into the subject, or discuss decisions from other states upon the question. We have no doubt that, under the statute of 1890, the governor was authorized to make the appointments which he did make, and that these officers are *de jure* officers, and are qualified county commissioners of Yakima county.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., ELLIS, CHADWICK, FULLERTON, PARKER, HOLCOMB, and MAIN, JJ., concur.

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Syllabus.

[No. 12533. *En Banc*. January 11, 1916.]

TACOMA MILL COMPANY, *Appellant*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Respondent*.¹

CONTRACTS—CONSTRUCTION—IN PARI MATERIA. Where a written agreement refers to a right of way deed between the parties, and the deed refers to the written agreement, in recital of its consideration and purposes, the two must be considered *in pari materia*.

DEEDS—CONSTRUCTION—INTENTION—UNAMBIGUOUS WORDS. While the contract must be read as a whole and the general design must not be frustrated by allowing too much force to single words or clauses, the controlling canon for the interpretation of deeds, if unambiguous, is to ascertain the intention of the grantor from the words employed.

RAILROADS—RIGHT OF WAY DEED—CONSTRUCTION—USE—PURPOSES AUTHORIZED. A right of way agreement and deed for a railroad company's "Bay Side extension" along the water front of a large city, "for railway and similar purposes," through the grantor's mill property, in consideration of certain privileges, the railroad company agreeing to erect a fireproof tunnel, and maintain grade crossings and a switch and free switching service for the sole use of the grantor, being unambiguous and without any reservations or limitations as to the number of trains to be run or the right to extend the branch line to any other point should it be found necessary, will not be construed to limit the company to the use of the way for a branch freight line to serve local industries, for which it was originally constructed, and the grantor cannot object to the company's use of the extension as a part of its main line upon making a necessary change in the main line route, merely because some of the grantor's privileges will be curtailed or destroyed by such extended use of the way; since it was obvious that the "Bay Side extension" was more than a mere side track or industrial spur, and that the growth of the city and location of numerous industries might compel almost continuous use of the branch, and the legal effect of the grant was that the land may be used for such legitimate railroad and public purposes as the future necessities and convenience of the public required, and that the compensation received by the grantor was full indemnity for such uses.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—INTENT. Extrinsic evidence is not admissible to show an intent to limit or restrict the unambiguous absolute grant in a right of way deed for the com-

¹Reported in 154 Pac. 173.

pany's "Bay Side extension" "for railway and similar purposes," no fraud or mistake being claimed, the parties having dealt at arm's length and the contract being drawn by competent counsel and fully considered; since all negotiations and limitations that might readily have been expressed must be considered merged in the final agreement.

MORRIS, C. J., and CHADWICK, J., dissent.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 12, 1914, in favor of the defendant, dismissing an action for equitable relief, tried to the court. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

HOLCOMB, J.—Negotiations initiated September 2, 1887, by respondent's predecessor, Northern Pacific Railroad Company, and carried on between it and appellant, resulted in an agreement and deed to the railroad company for a right of way through appellant's premises. The original agreement was drawn up in writing and, passing from hand to hand and from party to party, was mislaid and lost a number of times before it was fully executed by the signatures of both original parties. Subsequent negotiations were had from time to time, during many years, to restore the original agreement, which finally culminated in an agreement which was formally made and executed in writing by the present railway company, respondent, and appellant, in the following terms:

"R. W. No. 33.

"This Indenture, Made this 24th day of January, A. D. 1906, by and between the Tacoma Mill Company, a corporation duly incorporated under the laws of the state of California, and doing business at Tacoma, in the state of Washington, the party of the first part, and the Northern Pacific Railway Company, a corporation incorporated under the

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laws of the state of Wisconsin, the party of the second part, Witnesseth as follows:

"Whereas in the month of May, A. D. 1888, the said party of the first part made an agreement with the Northern Pacific Railroad Company, then duly incorporated and organized as a railroad corporation, under an act of Congress of the United States approved July 2, A. D. 1864, which said agreement was never executed, and was in words and figures following, to-wit:

"This agreement, made and entered into this day of May, A. D. 1888, by and between the Tacoma Mill Company, a corporation duly incorporated under the laws of the state of California, the party of the first part, and the Northern Pacific Railroad Company, a corporation duly incorporated by act of Congress approved July 2nd, A. D. 1864, Witnesseth:

"Whereas, the said parties to this agreement heretofore, to-wit, on April 20th, 1888, by their respective attorneys thereunto duly authorized, executed a certain memorandum of agreement, relative to a right of way to be granted through the mill property of the said party of the first part, in the city of Tacoma, Pierce county, Washington Territory, for what is known as the Bay Side extension of said company's railroad along the water front of Commencement Bay, and which said agreement provided for the execution of and delivery of a deed by said party of the first part, conveying to said party of the second part the said right of way, for the consideration and upon the conditions and with the reservations therein and hereinafter set forth, and which said agreement also provided that a contract should be entered into by and between said parties in proper form setting forth the contents of said memorandum, and the conditions upon which said right of way was granted, and all the agreements, covenants and stipulations of the parties relating thereto.

"And whereas, the said party of the first part has this day duly executed said conveyance of said right of way to be delivered to said party of the second part upon its execution of this agreement, which said right of way is located upon a strip of land twenty (20) feet in width (being ten [10] feet in width on each side of the center of said proposed line of railroad as surveyed and laid out, and hereafter to be constructed) across the lands in section twenty-nine (29), township

twenty-one (21) north, of range three (3) east, W. M., owned by the Tacoma Mill Company, the center line of said strip of land beginning one hundred (100) feet east and sixty-nine and thirty-one one-hundredths (69.31) feet north from where the center line of Second street, in Tacoma, W. T., intersects the western boundary of section twenty-nine (29), township twenty-one (21) north, of range three (3) east, W. M., running thence south $76^{\circ} 25'$ east, two hundred and six-tenths feet; thence on a 7° curve to the right two hundred and twenty-six and two-tenths feet; thence south $60^{\circ} 35'$ east two hundred and eighty feet; thence on a $12^{\circ} 30'$ curve to the right one hundred and sixty feet; thence south $40^{\circ} 35'$ east, one hundred feet; thence on a $12^{\circ} 30'$ curve to the left to a point one thousand two hundred and fifteen feet east of the western boundary of section twenty-nine (29) aforesaid, assuming said western boundary of section twenty-nine a meridian of reference in the foregoing description; and it is to be held by said second party as in said conveyance is set forth.

“Now, therefore, in consideration of the premises, and to carry out said memorandum agreement the parties hereto agree as follows:

“First: The said Northern Pacific Railroad Company shall enclose their track and roadway to be laid and located upon said right of way with a good house or tunnel, constructed of iron or other fireproof material, and shall occupy in construction, as little room as possible; the said tunnel shall begin near the eastern boundary of said mill company's property, not exceeding twenty feet west of gate leading to log pond, and to continue on through the property with said house or tunnel as the said mill company may direct; said tunnel shall not exceed nineteen feet in the clear above the rails, and is to be kept and maintained in good and safe condition by said railroad company and at its expense, and said track and roadway across said mill property must be established at such a grade so that said tunnel, when constructed, will clear the chutes and other connections with said mill as the same shall be altered to provide for said construction, and will not interfere with the operation of said mill.

“Second: The railroad company shall repair or replace as the case may be, all chutes and roadways leading to and

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from the mill, machine shops, mess house and other buildings on said mill company's property, wherever the same are in any way impaired or torn away in course of construction of said railroad, and shall put said chutes and roadways in as good working order or condition as they were before said interference with the same before construction, or shall bear the expense of so doing; the planer mill to be added to where any portion is removed or taken away in construction, and the planers moved and put in as good working order as they were before removal, at the expense of said railroad company.

"Third: The line of said railroad is to pass within eight (8) feet of the gate leading to log pond, and said railroad company is to construct a span sufficiently long so as not to interfere with the booming privileges or the sluicing of logs through said gate into the log pond, but said span not to exceed fifty (50) feet in length; thence in a westerly direction, the said line passing the mill and machine shop with as little damage thereto as possible; after passing said machine shop line of railroad to be as near the bank as possible.

"Fourth: The said Northern Pacific Railroad Company shall remove so much of the western end of the two railroad tracks, and trestle on which same are laid, lying east and adjoining the mill property as is situate upon lots one and two of the water front lots of the Northern Pacific Railroad Company hereinafter mentioned; the space so vacated, to-wit: the western end of what is known and designated as lots numbered one (1) and two (2) on the map called the map of the water front lots of the Northern Pacific Railroad Company, which said map is to be found in the office of the assistant general manager of the said railroad company at Tacoma, Washington Territory, and a blue print copy of which was furnished on or about April 20th, 1888, to said mill company to identify said lots, the said lots being at the western extremity of the property of the Tacoma Dock and Warehouse Company on said water front. And said railroad company shall in due form execute and deliver a lease of said lots to said mill company, to have and to hold the same for its sole use as a dumping or booming ground for its logs, free of any rental charge, and to be used and occupied for such purpose by said mill company as long as the said railroad company shall use the property granted by said mill company as a right of way for railroad or other purposes, and the delivery

of said lease shall be concurrent in point of time with the delivery of said deed.

“Fifth: It is also agreed that the wagon road now leading from the mill property in a westerly direction across the property of the Tacoma Land Company, and connecting with Second street, in the town of Old Tacoma, shall remain and be kept open in its present location, and to the extent of its present width (thirty feet) until such time as such other wagon road or street shall be opened up through said property leading from the mill property and connecting with Second street, as shall equally as well, or better, accommodate and suit the convenience of said mill company in reaching points west of their mill property in Old Tacoma, by wagon road; and that the railroad company shall put in and maintain a good and sufficient crossing for said road.

“Sixth: The said Northern Pacific Railroad Company shall also put in and maintain in said tunnel as many doors, openings or gangways leading to and from the mill, machine shop and other buildings, as may be necessary in adapting to the successful operation of said mill, and its business, the obstruction caused thereto by the construction of said tunnel. The said Northern Pacific Railroad Company shall also put in and maintain a side track or spur for the sole use and benefit of the mill company in shipping or receiving lumber or goods, said spur to leave the main track at a point beginning opposite to the western end of the machine shop and extending northwardly and westwardly, in a parallel direction with said main track, over the western portion of said mill company's property to a point on the western line of the mill company's property a distance of five hundred feet. The said railroad company also shall do all switching of cars necessary in the use of said railroad in the carriage or moving of said mill company's lumber or goods to and from said mill, free of any charge to the said mill company so long as the line of said railroad over and through said mill property shall be used and operated by said railroad company, and while the said right of way is used by it for a railroad or other purposes. Said switching to be done promptly, as the business of said mill company shall require; provided, however, that in all cases of switching referred to, it is to be understood that the switching to be done free is for business that has reached the city of Tacoma by the Northern Pacific Railroad

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and for business originating at the mill company's mill to be shipped out by way of the Northern Pacific Railroad.

"Seventh: All foundations to mill or shops disturbed by said railroad company in the construction of said road shall be renewed or thoroughly repaired; the removal or altering of chutes made necessary in the construction of said line to be made so as not to interfere with the operation of the mill; that is to say, the change to be made either when the mill is idle, or so made as to change one chute at a time, so as not to in any way delay the work of the mill by making said change; all buildings damaged or removed by the railroad company to be fully repaired or moved at the expense of the said railroad company. That the mill company shall have the right, at all times, to cross the track and roadway either over or under the track of said railroad, with any water, sewerage or steam pipes; and that the work of crossing the property and making the changes, building tunnel, etc., by the railroad company shall be completed within sixty (60) days after the commencement of the work.

"Eighth: And the said railroad company hereby agrees to well, truly and faithfully keep and perform each and all of the agreements, stipulations and conditions by it to be kept and performed as herein stated, and that this contract and the deed to be executed and delivered by said Tacoma Mill Company, in pursuance thereof, shall be considered and taken as one transaction, and that said railroad company accepts said grant of said right of way upon the conditions and with the reservations herein set forth.

"Ninth: Two blue maps, one being a plat showing the location of the Northern Pacific Railroad Bay Side Extension through the Tacoma Mill Company's property, and the other being a map of the water front lots, showing proposed railroad tracks of the Northern Pacific Railroad Company, at Tacoma, and showing the location of said lots one (1) and two (2) herein set apart for the use of the Tacoma Mill Company for dumping and booming purposes, and which were furnished by said railroad company to said mill company on or about April 20th, 1888, are hereby referred to as illustrating the situation of the premises in question, and by such reference are made a part hereof.

"And whereas said Northern Pacific Railway Company, said party of the second part, is the successor in interest of

said Northern Pacific Railroad Company, and has acquired its property, including the right of way referred to in said agreement of May, 1888, and has agreed to fulfill the terms and conditions thereof, and has ratified the said agreement;

“Now, therefore, the said Tacoma Mill Company, party of the first part, for and in consideration of one dollar, and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby grant to the said Northern Pacific Railway Company, said party of the second part, the right of way for railroad or other similar purposes, over certain real property owned in fee by said party of the first part, situate in Pierce county, state of Washington, and particularly described as follows:

“A strip of land twenty (20) feet in width through section twenty-nine (29), township twenty-one (21) north, range three (3) east of the Willamette Meridian, being ten (10) feet on each side of the center line of said railway, as now constructed and operated and described as follows: Beginning at a point marked by a monument, eight-four and seventy-six hundredths (84.76) feet north, and one hundred (100) feet east of the intersection of center line of North Thirtieth (30) street in the city of Tacoma, Washington, and the western boundary line of section twenty-nine (29), township twenty-one (21) north, range three (3) east of the Willamette Meridian; thence on a curve to the left of five hundred seventy-three and sixty-nine hundredths (573.69) feet radius, a distance of one hundred thirty-two (132) feet, said curve being a tangent at its point of beginning to a line bearing south sixty-three degrees (63°) twenty-six minutes (26′) east, thence south seventy-six degrees (76°) forty minutes (40′) east a distance of one hundred thirty-three and nine-tenths (133.9) feet, thence on a curve to the right of eight hundred nineteen and two hundredths (819.02) feet radius, a distance of two hundred twenty-seven and four-tenths (227.4) feet, thence south sixty degrees (60°) forty-five minutes (45′) east a distance of two hundred seventy-six and five-tenths (276.5) feet, thence on a curve to the right of four hundred fifty-nine and twenty-eight hundredths (459.28) feet radius, a distance of one hundred fifty-three and six-tenths (153.6) feet, thence south forty-one degrees (41°) thirty-three minutes (33′) east a distance of one hundred twenty-four and one-tenth (124.1) feet; thence on a

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curve to the left of four hundred fifty and eighty-nine hundredths (450.89) feet radius a distance of two hundred forty-five and six-tenths (245.6) feet to a point marked by a monument, which monument is located three hundred and fifty-three and four one-hundredths (353.04) feet north of the south boundary line of section twenty-nine (29), township twenty-one (21) north, range three (3) east, Willamette Meridian, when measured at right angles thereto, from a point located in said south boundary line, one thousand two hundred and fifteen (1,215.0) feet east from the southwest corner of said section twenty-nine (29) when measured along the south boundary line of said section. Assuming said western boundary of said section twenty-nine (29) as a meridian of reference in the foregoing description.

"To have and to hold the said described property to the said party of the second part, as long as the said party of the second part, its successors and assigns, shall use the same as a right of way for railroad or other similar purposes.

"This deed is made upon the express condition and upon the understanding of both parties hereto that the property herein conveyed shall be used by the said party of the second part, its successors and assigns, for the uses and purposes above stated, and shall be null and void, and the land herein conveyed shall revert to the said party of the first part, its successors and assigns, if the said party of the second part, its successors or assigns, shall transfer, lease, sell or convey the said right of way, or any part thereof hereby granted, for any other purpose excepting as above stated, to any other party, without the written consent of the president of the said Tacoma Mill Company.

"The party of the second part accepts the deed, and hereby covenants and agrees that it will pay promptly when they may fall due all taxes and assessments against the said right of way premises hereinbefore conveyed, and every part of the same, as long as said party of the second part shall occupy said premises as a right of way for railroad or other purposes.

"The covenants and conditions herein and in said agreement shall be binding and inure to the benefit of the successors or assigns of each party hereto, and each and all of the covenants in said agreement shall be deemed as covenants running with the land hereby conveyed, and shall be binding and

obligatory upon the respective successors and assigns of each of the parties hereto.

"In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names, by their duly authorized officers, and their corporate seals to be hereto affixed, this 24th day of January, 1906.

"Attest:

(Seal)

"Jno. W. Classen,

"Secretary.

Tacoma Mill Company,

By H. C. Chesebrough,

Its President.

"Attest:

(Seal)

"R. H. Relf, Assistant Secretary.

Northern Pacific Railway Company,

By Howard Elliott,

Its President."

On the same date as the original agreement, May 26, 1888, a deed of the right of way granted to respondent's predecessor was executed but not delivered by appellant, the material part of which is as follows:

"In consideration of the execution this day by the party of the second part of a certain collateral agreement of even date herewith, made and entered into with said party of the first part relative to the right of way hereinafter granted, and defining their rights and obligations of each of the parties to said agreement respecting said right of way, and stating the conditions and reservations upon and with which the said right of way is granted, the said party of the first part has bargained, sold, conveyed and confirmed, and by these presents does bargain, sell, convey and confirm to the said party of the second part, its successors and assigns, the following described tract of land, as a right of way for the construction, operation and maintenance on, across over and through the same by the Northern Pacific Railroad Company, of a standard gauge track railroad, to be used and operated as the Bay Side extension of said company's railroad along the waterfront of Commencement Bay, in the city of Tacoma, Pierce county, Washington Territory, situated and more particularly described as follows, to-wit:" (Then follows description by metes and bounds.)

The original agreement made on May 26, 1888, as was said, was mislaid a number of times before signing by both parties, and it required about eighteen years to bring about

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a formal restoration of the original agreement from the office copies of the parties at the time, and the execution of the formal writing of January 24, 1906, by both parties, expressing, as might be supposed, the meeting of their minds.

The history of the transaction, as shown by the record, discloses that very eminent and able counsel, among whom were the late H. G. Struve, Mr. Ashton, and the present senior member of the appellant's firm of counsel, acted in the matter for appellant; Mr. McNaught and Mr. Mitchell, former counsel for respondent's predecessor, and Mr. Grosscup, former counsel for respondent, all had much to do with the preparation of the writings, and carefully examined and considered them before their final approval and execution. Notwithstanding all this, it is now contended by appellant that the writings are open to construction and subject to evidence as to the intention of the parties to the agreement.

It will be observed that the written agreement refers to the right of way deed given by appellant to respondent, and the deed also refers to the written agreement of the parties, in recital of its consideration and purposes. The two instruments must, therefore, perforce be considered *in pari materia*.

Broadly and briefly stated, the issue between the parties is, whether the easement granted and conveyed by the mill company is an absolute and unqualified grant of the described right of way for any and all railway and other similar purposes within the railway company's public and corporate powers, or whether it contemplated merely a limited and qualified easement of the right of way for the uses and purposes of the so-called "Bay Side Extension" of the railway company, to be used for a freight and industrial track only.

The pleadings are voluminous and cannot be extensively set out without making this opinion much too long. The complaint proceeds upon the theory that it was represented by respondent's predecessor, and understood and agreed upon by and between the parties, that the Bay Side extension of

the railway was to be constructed along the water front of Commencement Bay, in the city of Tacoma, over and across appellant's property, solely for the accommodation of the property owners and industries then or thereafter to be located along the water front, and that the engines and cars of the railway would only pass over the road as often as necessary to get freight and do switching for such property owners and industries; that now the railway company has extended its line from the former terminus of the Bay Side extension as then constructed, and maintained and operated for a period of over twenty years, a number of miles to Tenino on its old main line; that the railway company intends and threatens to operate all its trains between Tacoma and Portland and intervening points and all points in Southwestern Washington, save and except such freight and passenger trains as it may be necessary to run over the heretofore existing main line to take care of local business between Tacoma and the point of intersection with the new line; that it is its further intention to contract for its own profit with the Oregon-Washington Railroad & Navigation Company and the Great Northern Railway Company, heretofore using the existing main line between Tacoma and Portland, by which the last named companies will operate their trains from Tacoma to Portland through the premises of appellant over the new line; that appellant will be irreparably injured by such intended and threatened additional uses and burdens, for which it cannot be adequately compensated in damages; for which appellant prays injunctive and other equitable relief.

The respondent traverses the appellant's allegations as to the representations, understanding, and agreement alleged to have been made by and between the parties, other than as shown and fully expressed in the written agreement and right of way deed set up by appellant; admits that it has constructed and intends to use for its general railroad purposes the extension of its "Bay Side Extension" to Tenino;

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that it has agreed with the Oregon-Washington Railroad & Navigation Company to allow it the joint use of the track for a valuable consideration; that it has granted the Great Northern Railway Company five years within which to determine whether it will desire the use of the track over which to run its trains between Tacoma and Portland under a joint operation contract, but that that line has so far declined such offer and signified no intention to enter into such an arrangement; it denies the allegations of the complaint as to irreparable injuries and damages and possible future injuries, hazard and damages.

Respondent further affirmatively alleges that it is the grantee and successor in interest of the Northern Pacific Railroad Company, and of all its property, franchises, and rights, including the right of way in controversy; that the track constructed and operated upon that right of way was in no sense a spur track or siding; that the growth of the population served by respondent's railway system, and of its business as a common public carrier, has made it necessary for it to increase its carrying capacity and facilities, and to use the right of way in question for main line purposes; that it is so authorized and empowered by the instrument of conveyance from appellant, dated January 24, 1906, and that such use is in no way inconsistent with the terms of that instrument, or in violation thereof. It further alleges in its answer that the growth of population, business, and traffic created an existing public necessity that the respondent construct, maintain, and operate what it calls its "Point Defiance Grade Line" from Tacoma to Tenino, for the purpose of eliminating grades and curves in its old main line, and to use as a part of the "Point Defiance Grade Line" the right of way over and across appellant's property as conveyed to respondent; that it has constructed the "Point Defiance Grade Line" at a cost of many million dollars, and that the public interests and necessities require its operation.

There are further affirmative allegations in the answer not now necessary to notice; all of which were put in issue by the reply. Testimony was introduced by each party supporting its allegations, over the objection of the opposite party.

Ever since the execution of the contract on January 24, 1906, the respondent has maintained and operated the Bay Side extension through the tunnel across appellant's premises, as a freight track, to serve the industries situated along the water front of Commencement Bay between the main terminus of the original railroad and the Tacoma smelter. It has in the meantime constructed a double-track branch line from its main line at Tenino, in Thurston county, to the east shore of Puget Sound, and thence northerly along the shore to Point Defiance, and thence has constructed a double-track tunnel 4,500 feet in length through Point Defiance to the northwesterly shore of Commencement Bay, whence it parallels the Bay Side extension to a point immediately northwest of the premises of plaintiff, where the new line intersects the Bay Side extension. This line is known as the respondent's Point Defiance line, and it proposes to use the right of way through the premises of plaintiff as a part of its Point Defiance line to reach its station in the city of Tacoma, and likewise it proposes to use the Point Defiance line as its main line from Tacoma to Portland and to Southwestern Washington, and to operate thereon its freight and passenger trains, with the exception of some local trains, between the same points of intersection on the old line, and to permit the operation over the new line of freight and passenger trains of the Oregon-Washington Railroad & Navigation Company, and possibly in the future the Great Northern Railway Company.

The evidence discloses that the right of way through plaintiff's premises is twenty feet wide, and is built along the shore beneath the bluff on which plaintiff's mill is situated, and that the right of way is covered by a fireproof structure

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or tunnel which at places is only seventeen feet high, and at no place exceeds nineteen feet in height. In this tunnel are four twelve and one-half degree curves. A switch track is constructed within this tunnel, beginning near the center and extending to the northwestern margin of appellant's premises, as provided in the contract, for appellant's use. A grade crossing through the tunnel is maintained near the northwestern end of appellant's premises, connecting its offices, wharves, and lumber yards with the city by way of Old Town; and another grade crossing through the tunnel near the southerly end of appellant's premises connecting with the streets extending toward Pacific avenue, in Tacoma. These crossings are used by appellant for the purpose of marketing its lumber and slabs in the local market, and the crossings are at right angles to the city thoroughfares with which they connect, and persons and teams approaching the crossings are unable to see approaching trains. When the mill is in operation, teams are required to use these crossings, going or coming, every five or six minutes during the day, and in hauling heavy loads, teams are likely to become stalled on account of the grade at the crossings. There is evidence also that, if respondent is permitted to use this track as proposed, there will be considerable noise and vibration in appellant's offices during the passage of heavy trains; that it will be difficult to market the lower grade of its lumber in the local market by reason of the difficulty of access to its plant; that it will, therefore, be difficult to compete with other mills in the prosecution of its lumber business. There is also evidence that it is believed the mill property will be subjected to a greatly increased fire hazard.

At the outset it is conceded by appellant that, if the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence for the purpose of ascertaining their intention. It is contended that an examination of the instrument discloses that it is not, as the trial court assumed, a

mere deed granting a right of way for railroad purposes, a unilateral contract, but a mutual agreement formally executed by both parties; that the intention of the parties is not, therefore, to be determined solely by consideration of the words of grant, and in the construction of such a contract, courts must be governed by certain fundamental rules of construction.

It is, as contended by appellant, undeniably true that a fundamental rule of construction is that a written contract shall be read as a whole; that all its provisions are to be considered, and that the general design must not be frustrated by allowing too much force to single words and clauses.

"The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." *O'Brien v. Miller*, 168 U. S. 287.

On the other hand,

"The controlling canon for the interpretation of deeds, if unambiguous, is to ascertain the intention of the grantor from the words employed." *Bernero v. McFarland Real Estate Co.*, 134 Mo. App. 290, 114 S. W. 531.

The written instrument of January 24, 1906, is both a deed of conveyance of the right of way described therein and a contract containing conditions to be performed by the parties thereto. This contract reached back and incorporated and interpreted the original agreement and deed between appellant and respondent's predecessor of May, 1888. The present contract provides for the execution of certain conditions to be performed by the parties, viz., (1) for the respondent to make and deliver a lease of certain water lots owned by it to the appellant; (2) for the appellant to grant the right of way through its mill property as expressed in the agreement "for what is known as the Bay Side extension of said company's railroad along the water front of Com-

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mencement Bay.” These provisions were performed and, by the eighth paragraph of the agreement, the agreement and the right of way deed are to be “considered and taken as one transaction.” The grant of the right of way is as follows: “Now, therefore, the said Tacoma Mill Company . . . does hereby grant to the said Northern Pacific Railway Company . . . the right of way for railway or other similar purposes,” etc.

But appellant insists that the description by metes and bounds, following this paragraph, does not measure the grant, but simply defines the area of land over which the easement granted is to be exercised; that if the granting clause read “does hereby grant the [said] right of way for railroad or other similar purposes,” it would not be contended that the right of way grant was other than for the Bay Side extension.

Viewing the contract as a whole, it itself discloses that a large manufacturing plant belonging to appellant then existed, and was to be maintained upon the same premises, and that appellant would be adequately compensated for the grant of the proposed right of way by the new facilities to be given; that this property was to be protected by covering the right of way with a fire-proof tunnel which should not exceed nineteen feet in clear above the rail; that all roadways leading to and from the premises should be restored by the railroad company and all changes in the buildings made at its expense; that additional facilities should be afforded for the storage of plaintiff’s logs; that doors, openings, and gangways should be put in and maintained in the tunnel for the convenience of appellant’s business; that a side track should be built in this tunnel for the sole use and benefit of appellant in shipping and receiving lumber or goods; that the railroad company should do all switching of cars for appellant in its business free of charge, and that such switching should be done promptly as the business of appellant should

require; that the right of way should be but twenty feet in width.

It is insisted that the proposed use of the right of way by respondent will greatly diminish or wholly destroy some of the privileges thus reserved to the appellant by the terms of the agreement; that if, in addition to the uses of the original track as a freight or industrial track, it may lawfully use the same for the number of trains now proposed to operate over its line, then it may hereafter lawfully make such increased use as the exigencies of the future shall demand, and that it is certainly probable that the future demands upon its main line adjusted at this point to one track will require the practically continuous use thereof.

But the same thing may be said if it were construed to be the original intention of the parties that nothing but freight cars or switch engines should be moved over the original Bay Side extension, as it was called. It is evident that the Bay Side extension was not a mere side track or industrial spur, but was a sort of branch railroad, extending from the terminus of respondent's predecessor, and as long thereafter used by respondent in the city of Tacoma, to a smelter in the city of Tacoma near Point Defiance. There were a number of industries situated along that track to which side tracks or spurs were constructed and maintained for the purpose of handling freight. It is very obvious that the growth of a very large city might have compelled the location of a vast number of industries along this water front and along this Bay Side extension, to move the freight to and from which would require almost or entirely the continuous use of the track; that freight cars and engines might have to move upon it very frequently. Such being the case, it seems plain that the parties originally contemplated that such might be done.

There is nothing in the original or the present contract between the parties whereby the respondent or its predecessor was bound not to extend the Bay Side extension to any other

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point should it find it necessary, and there is nothing in either of the instruments prohibiting respondent or its predecessor from running any more than a certain number or kind of trains upon that track. The fact that the railroad track is designated and described in the agreement as the Bay Side extension does not operate to limit the nature of the use of the railroad in any way. The track was at that time known and designated as the Bay Side extension. It appears that there was a plan on foot, at the time the original negotiations were entered into between appellant and the railroad company, on the part of one Allen C. Mason, to construct an independent railroad to be called the Washington Short Line Railroad, from the terminus of the Bay Side extension, at or near appellant's property, to the then proposed site of the Tacoma smelter. It was desired by the railroad company to construct and operate such railroad itself, and steps were taken to acquire all the rights of Mr. Mason for the purpose of extending the Bay Side extension to the proposed site of the Tacoma smelter. This shows to a slight extent, at least, that the railroad was not considered merely a side track or industrial spur, but was in a certain sense a railroad, and as such was contemplated and designed to be a part of the railroad company's system and an extension thereof, although it was not then contemplated to be a main line railroad or any part thereof; the ultimate public and industrial demands and increased traffic, no matter to how large extent, must have been contemplated by the parties as part of the maintenance and operation of the road.

Appellant further urges, however, that it is our duty in defining the relative rights of the parties to ascertain their intent and, when found, to give effect to that intent; that the language employed is to be construed in the light of the facts and circumstances existing at the time of its execution and the objects and purposes the parties had in view; citing a number of authorities.

The same contention was made in the case of *Kanaskat Lumber & Shingle Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15, wherein this court, per Chadwick, J., observed:

"The duty of courts, when construing questioned contracts, to search out the intention of the parties, is well established, but that duty arises out of an ambiguity or omission that demands the reception of testimony to illustrate their intent, or to harmonize apparent conflicts. There is a presumption of finality which attends all written contracts and courts will not deliberately raise doubts or conjure ambiguities for the mere pleasure of construing them. *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, 140 Pac. 394. Nor will the fact that a party has made a hard or improvident bargain warrant the court in binding the other party to terms raised by construction or implication. These propositions are admitted as elementary by appellant; but it is said that the whole contract, when construed in the light of the facts and circumstances existing at the time the contract was made and the general object and purpose of the parties, demands a ruling that respondent was bound to keep appellant's mill in operation. . . . There is nothing, unless we go outside of the written contract, to bring the parties within the rule announced in *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459, where the court found the contract to be ambiguous and applied the rule as it relates to an established business having a certain demand for a certain amount of stock, which must have been known to the opposite party who was held to have contracted with reference thereto. . . . We have discussed this phase of the case enough to demonstrate that to receive testimony or to imply terms would but lead to confusion, whereas courts invite testimony to clear up ambiguous contracts and to make that certain which is uncertain. Although questioned by counsel, we think the case of *Hamlyn & Co. v. Wood & Co.*, 22 Q. B. Div. (1891) 488, is in point. We agree with the observation of Lord Esher, M. R., that authorities are of little use in cases of this character, for at best they merely show that, in a particular case, an implication was or was not made."

In *Hamlyn & Co. v. Wood & Co.*, 22 Q. B. Div. (1891) 488, cited by Chadwick, J., it was observed by the opinion writer that:

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"When parties have put into writing the terms upon which they agree, more especially in the case of mercantile contracts, it is a dangerous thing lightly to imply what they have not expressed. Here it is clear that there is no breach of the contract as expressed upon the face of the written document."

"It is a well settled principle of law that all prior negotiations of the parties are merged into a contract in writing when one is entered into covering the subject-matter of such negotiations, and we are not aware of any rule which will authorize oral proof, as to representations made before the execution of such contract, to be introduced in evidence for the purpose of contradicting or enlarging the scope of such contract, without an allegation in the pleadings that such contract was in fact signed by the party making such allegations by mistake or fraud, or without full knowledge of the conditions thereof. As we have seen, such allegations were entirely wanting in the case at bar, and we think all representations or negotiations prior to the execution of said contract were, under the circumstances of this case, entirely immaterial, if the contract in question was unambiguous." *Staver & Walker v. Rogers*, 3 Wash. 603, 28 Pac. 906.

So in the case at bar. Appellant did not plead any mistake or fraud. There was no fiduciary relation between the parties. They dealt at arm's length. Each party was represented by extremely competent counsel. They proceeded with the utmost care and deliberation.

Without reviewing all the cases cited by appellant upon this phase of the case, it will be found that in nearly all of them appears some fact or circumstance tending to show fraud or mistake, aside from the mere reliance upon the representations of the other party to the contract as to its contents.

"A deed which is upon its face an absolute grant is not subject to have reservations or limitations engrafted thereon by parol or extrinsic evidence of intentions, understandings, or agreements contradictory to or at variance with its clear language." 17 Cyc. 620.

“In order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; and the evidence must not tend to vary or contradict the terms of the written instrument or to defeat its operation.” 17 Cyc. 714.

See, also, *Hubenthal v. Spokane & Inland Empire R. Co.*, 43 Wash. 677, 86 Pac. 955; *Hathaway v. Yakima Water, L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 874; *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

The conveyance in question conveys by absolute grant the right of way for railroad and other similar purposes to the respondent. There are no reservations or limitations engrafted upon it, limiting or qualifying the grant for railroad and other similar purposes. Had appellant desired to limit its use as a right of way by providing that it should be used only for freight purposes, or only as an industrial spur, or that only a certain number of trains, engines, or cars should be moved thereon during the day or during certain hours, or that, in case of being used for additional purposes, other than the uses and purposes immediately contemplated, appellant should be compensated by the payment of further damages than the consideration expressed in the contract, all those things could easily have been included in the contract, and not having been included, it is reasonable to infer that they were not intended to be required.

The legal effect of the grant to the railroad company of a right of way to be used for railroad and other similar purposes is that the land thus taken and paid for for public use may be used for a public use by those corporations which act as agents and trustees for the public, that such corporations have a right to make all the use of the land which the necessities and convenience of the public may require, and that the land owner receives in damages a compensation which in theory of law is all the indemnity for all such uses. *Brainard v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74; *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 29 L. R. A. (N. S.) 465.

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The purpose of the taking must fix the right. *Newton v. Perry*, 163 Mass. 319, 39 N. E. 1032.

In an action to recover damages claimed to result from the increased use of the defendant's railroad, it was held that the grant of a right of way to a railroad company "for all uses and purposes or in any way connected with the construction, preservation, occupation and enjoyment of said railroad," is broad enough to embrace all uses for railroad purposes, however much increased; and that it will be conclusively presumed that all damages to the land outside of the right of way, past, present, and future, were included in the consideration paid for such grant. *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363. This case was reaffirmed by the supreme court of Illinois in *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578, 59 N. E. 240.

Certain property owners executed a deed to a railroad company, granting the right of way for a branch road across their property. The supreme court of Minnesota in that case (*Liedel v. Northern Pac. R. Co.*, 89 Minn. 284, 94 N. W. 877), held that the road constructed pursuant to the contract was not a private line for the benefit of the property owners only, but was a public line, a part of the company's railroad system, and subject to general state laws governing railroads. In that case it was said:

"Considering the contract in all its bearings, we are satisfied that it is not susceptible of the interpretation put upon it by respondent. The grant is absolute of a strip of land through the property described to be used for a right of way for the railroad track. In consideration of this grant the railroad company agreed to construct a track over the right of way and to transfer or switch cars from it and its main railroad to and from any private tracks connecting therewith at no greater than the usual charges for such services. The effect of these provisions was to make this branch road a part of the main system, and, in connection therewith, to subject it to the regulations of the State Railroad and Warehouse Commission. This branch is in no sense a private track, but is a complete and efficient part of appellant's railway system. It

may be used for the benefit of the public as well as the private property referred to, and the company may establish a station or freighthouses and condemn property for its uses in connection therewith to the same extent that it may for the benefit of any other part of the road. This inference is not modified by the language pointed out by respondent, viz., that the track is for the accommodation and use of the parties to the deed. That clause neither adds to nor takes away from the effect of the contract. If it be stricken out, it would follow that the track became a part of the main system, and for that reason must be operated for the accommodation of the company; but it must be operated for the benefit of the grantors also, without regard to that clause, for the reason that it is required to be connected with their private side tracks, and that cars be delivered at reasonable rates. Neither does the other provision add to or take away anything from the effect of the contract, viz., that the rights of the company shall cease and determine at any time when the strip of land ceases to be occupied for such railroad track. In the absence of such an agreement, it does not follow that the railway company, of its own volition, might arbitrarily abandon the track, and leave the grantors without railroad facilities. In this respect the community is also under the dominion of the laws of the state."

In *Abraham v. Oregon & C. R. Co.*, 37 Ore. 495, 60 Pac. 899, 82 Am. St. 779, 64 L. R. A. 391, Bean, J., writing the opinion, said:

"We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words 'legitimate railroad purposes' were used in the deed in a particular sense. It is an elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used. . . . 1 Greenleaf, Evidence (15 ed.) § 295. And Lord Chief Justice Tindall says: 'The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper

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application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the parties affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.' . . . 'Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances.' It is, therefore, not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used. . . . Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes."

In *St. Louis & B. Elec. R. Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N. E. 326, the court said:

"If the appellees desired to reserve the right to build crossings across the right of way, and across the roadbed of the appellant, they should have embodied such a provision in the contract. . . .

"Where a railroad company obtains a right of way by purchase from the land owner, having power under the constitution and law to do so, all the incidents attach to such right as are acquired by eminent domain when the right of way is obtained by condemnation, it being conceded or established that such company can lawfully exercise the power of emi-

nent domain. In other words, a railroad company acquires the same rights and privileges under a private grant as to the construction and operation of its road, as under a right of way acquired by condemnation, where it has the power, under the law, to receive by grant and to acquire by condemnation. Had this right of way been lawfully acquired by condemnation appellees would have received compensation for the value of the strip of land, and also an assessment of all damages to the residue of their tract to result from the construction and operation of the road. 'The rule is, that the appraisalment of damages in a case of condemnation embraces all past, present and future damages, which the improvement may thereafter reasonably produce.' . . . Here, the strip of land is, by the terms of the contract, to be conveyed for the purpose of a railroad right of way, and for the purpose of constructing and operating thereon a double track electric railway."

It is not contended by appellant in this case that the proposed additional use by respondent of the right of way in question is not a legitimate railroad purpose. We can see nothing ambiguous in the contract that subjects it to extrinsic construction. We are impelled to the conclusion that the judgment of the lower court was right.

Affirmed.

FULLERTON, ELLIS, MOUNT, MAIN, and PARKER, JJ., concur.

MORRIS, C. J. (dissenting)—I cannot concur in the majority opinion. Time and pressing engagements prevent my writing a formal dissent. I wish, however, to express in a casual way the reasons for my views.

The majority opinion is based upon the fundamental error that the contract of January, 1906, is an unlimited grant of a right of way for general railroad purposes. The first rule of interpretation as applied to grants is that the contract must be viewed with reference to its subject-matter, its obligations, and the manifest purpose and intention of the parties. The majority opinion concedes this rule, then departs from

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it, holding that the granting words in the so-called deed of January, 1906, are broad enough to entitle the railway company to use the right of way for general main line purposes; ignoring in so holding, not only the basic rule of interpretation, but the manifest intention of the parties as expressed in the instrument itself. It is as clear as language can make it, when the agreements of January, 1906, and May, 1888, are read together as they should be, that the parties were dealing with only one contemplated use—a right of way for the so-called Bay Side extension. All parties knew and contracted with knowledge of the fact that this extension was a freight service track for the accommodation of industries along the water front. Now, after so using this right of way all these years (a use confirming the limited character of the granted right as contemplated by the parties), the railway company constructs a new main line intersecting this extension right of way at the northwest boundary of appellant's property, and has since such construction used this right of way, not only for the purposes of its Bay Side extension, but also for trackage for the freight and passenger service of the Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Great Northern Railway Company in connection with the new main line to the south, known as the Point Defiance line. It is frankly conceded by the railway company that such a use was never dreamed of at the time the right of way was granted, and it is now permitted because it is said that the so-called deed of January, 1906, is an absolute grant of a right of way for railroad purposes, and parol evidence is not admissible to vary or contradict its terms.

I deny, first, that the agreements of January, 1906, and May, 1888, show an absolute grant for railroad purposes, and second, that there is an attempt here to vary or contradict the terms of a written agreement. To contradict a written agreement is one thing. To admit evidence to enable the

court to ascertain the real intention and agreement of the parties and enforce it accordingly is another thing. The first may not be done; the second may, either by reforming the instrument itself or by treating it as reformed.

These are, in the main, the reasons why I cannot concur. More time might enable me to make them plainer. I have, however, said enough to indicate the ground of my dissent, without attempting to show the extent to which the facts and law sustain my views.

CHADWICK, J., concurs with MORRIS, C. J.

[No. 12701. Department Two. January 11, 1916.]

TRIANGLE TRADERS *et al.*, *Appellants*, v. THE CITY OF
BREMERTON, *Respondent*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REASSESSMENTS—AUTHORITY—STATUTES. Where confirmation of a sewer assessment was denied on appeal and the assessment set aside for failure to comply with 3 Rem. & Bal. Code, §§ 7892-10, 7892-15, 7892-16, in various particulars, the court may order the city council to levy a reassessment, notwithstanding some of the errors made were jurisdictional, under 3 Id., § 7892-42, providing that the city council shall make a reassessment whenever the original has for any cause been set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court.

SAME—PUBLIC IMPROVEMENTS—COST OF WORK—EXTRAS—SETTLEMENT. The invalidity of a sewer assessment cannot be urged on the ground of excessiveness, arising through a settlement with the contractor allowing more than the contract price on the unit basis agreed upon, where the excess came through necessary changes entitling the contractor to extra compensation under the contract.

SAME—SETTLEMENT—CONCLUSIVENESS. A settlement allowing a contractor for sewer construction extra compensation on account of changes in the work, pursuant to the terms of the contract, is conclusive upon property owners assessed for the costs, in the absence of allegation or proof of fraud or collusion.

¹Reported in 154 Pac. 193.

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SAME—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICTS — ENLARGEMENT—STATUTES. If a sewer assessment district does not include all the property susceptible of sewerage or drainage through the contemplated sewer, as required by 3 Rem. & Bal. Code, § 7897-15, the city could, by proper proceedings, enlarge the district by including the omitted property; and especially so, after a reassessment had been ordered under 3 Id., §§ 7892-42, 7892-43, requiring the reassessment to be made upon all property specially benefited, whether or not included in the original assessment district; provided the assessment does not exceed the actual cost and expense of the improvement.

SAME—PUBLIC IMPROVEMENTS—ASSESSMENTS—ORDINANCES. Under 3 Rem. & Bal. Code, § 7892-43 providing that a city shall proceed to make a reassessment by "passing an ordinance ordering the same," a reassessment authorized by resolution only is invalid.

SAME—ASSESSMENTS—DISTRICTS—APPORTIONMENT—VALIDITY. An assessment for a trunk sewer must have the boundaries of the district prescribed by ordinance, and the levy upon property between the termini of the improvement back to the middle of the block must be limited to the reasonable cost of a local sewer and its appurtenances, the remainder of the cost to be distributed over all the property in the district in accordance with special benefits in proportion to area, as expressly required by 3 Rem. & Bal. Code, §§ 7892-15 and 7892-16.

Appeal from an order of the superior court for Kitsap county, Smith, J., entered November 30, 1914, confirming an assessment roll for a public improvement, after a hearing before the court. Reversed.

Frank P. Lewis and Louis Henry Legg, for appellants.

Thomas Stevenson, for respondent.

FULLERTON, J.—On May 20, 1912, the city council of the city of Bremerton, by an order duly recorded in the minutes of its proceedings, directed the city engineer and the city attorney to take the necessary preliminary action relative to the construction of a trunk sewer on certain streets in such city, known as Warren and Ninth streets and Park avenue. Pursuant to such order, the city engineer prepared plans for such trunk sewer, and submitted the same to the council with an estimated cost thereof. The plans were adopted by

the city council on motion to that effect, and were "signed by the mayor and clerk." On July 29, 1912, the city council passed a resolution declaring its intention to order the improvement to be made. The resolution, while it contained much extraneous matter not required by the statute, contained all of the required essentials; it set forth the general nature of the improvement, described the routes along which the sewer was to be constructed, notified all persons who desired to object thereto to appear at a meeting of the city council at a time specified therein and present their objections, and directed the city engineer to report to the council, at or before the time fixed for the hearing, the estimated cost and expense of the improvement. The resolution was, however, published in but one issue of the official newspaper of the city, whereas the statute distinctly prescribed that it should be published in two of such issues. Laws of 1911, pp. 444, 449, §§ 10, 16 (3 Rem. & Bal. Code, §§ 7892-10, 7892-16).

On September 9, 1912, the city council, by ordinance, ordered the sewer to be constructed. The ordinance described with sufficient certainty the routes along which the sewer was to be constructed, contained an estimate of the cost thereof, and provided that the cost should be borne entirely by the property benefited, and that no part thereof should be charged to the general fund of the city. The city council, however, did not therein "establish and fix the boundaries of the district to be assessed for such improvement," although the statute specifically provides that they shall do so. Laws of 1911, p. 449, § 16 (Id., § 7892-16). Nor did they in this ordinance, or in any subsequent ordinance, adopt "maps, plans and specifications" for the improvement, notwithstanding this also is a specific requirement of the statute. Laws of 1911, p. 449, § 16 (Id., § 7892-16). In providing for the distribution of the assessment over the property benefited, the city council, in the ordinance, provided that a specific sum should be assessed against the property lying between

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the termini of the sewer and back to the middle of the blocks lying on each side thereof, and that the balance of the cost and expense should be assessed against the remainder of the property in the district; notwithstanding the statute specifically provides that,

“In distributing such assessments, there shall be levied against the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the street or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances . . . and the remainder of the cost and expense of such improvement shall be distributed over and assessed against all of the property within the bounds of said entire district in accordance with the special benefits conferred thereon and in proportion to area.” Laws of 1911, p. 449, § 15 (Id., § 7892-15).

After the passage of the ordinance, the city council directed the clerk to advertise for proposals for the construction of the sewer. Several bids were submitted in response to the advertisement, and that of one L. Y. Stayton was accepted as the lowest and best bid. His bid was submitted on the unit basis; that is, at certain prices per lineal foot for the sewer pipe in place, based upon dimensions, certain fixed prices for catch basins and manholes complete, and certain fixed prices for the necessary connecting wyes. On October 15, 1912, a contract for the work was entered into between the city and Stayton, by the terms of which Stayton agreed to perform the work according to the plans and specifications reported by the city engineer at the prices stated in his bid; the estimated cost of the sewer completed at the prices named being \$21,988.10.

The contractor immediately began the work of construction, and proceeded therewith until some time in April, 1913, when he ceased work thereon for some reason not clearly explained in the record. On May 5, 1913, the city engineer, at the direction of the city council, notified the contractor to resume the work within five days thereafter. The contractor

failed so to do, and the council, on May 12, 1913, by resolution, declared his contract forfeited, notice of which was given to the contractor, to his bondsmen, and to a banking corporation to whom the contractor had assigned the sums to become due him under the contract. This led to a meeting of the parties interested, and to an agreement between them by which the city, in consideration of certain changes made in the original contract with reference to the mode of payment to the contractor and certain waivers of claims made by the other parties, agreed to rescind the resolution annulling the contract and to permit the contractor to complete the contract according to its terms as modified by the agreement. The resolution referred to was thereupon rescinded and the contractor permitted to prosecute the work to its completion. The agreement thus entered into permitted the city to pay directly to the laborers and materialmen for the labor and material used in the construction of the sewer, and the subsequent liabilities for labor and material incurred by the contractor were so paid.

On January 5, 1914, the engineer submitted a final estimate of the cost of the work. This showed estimates according to the terms of the contract up to May 5, 1913, and from thence on the actual cost of the work as paid by the city, plus ten per cent on the amount thereof to the contractor; the aggregate totaling \$40,927.63.

On May 9, 1914, the city council passed a resolution giving notice of its intention to amend the original ordinance authorizing the construction of the sewer, and on April 13, 1914, passed an ordinance to that effect. The material change was the enlargement of the district by the inclusion therein of property not described in the original resolution of intention to order the work. The amended ordinance, like the original ordinance, provided for the assessment of named sums upon the half blocks abutting upon the sewer between the termini thereof, and for the assessment of the balance of the cost to the remainder of the property in the assessment

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district. Nowhere in the ordinance is it recited that the fixed sums directed to be levied on such abutting property "would represent the reasonable cost of a local sewer and its appurtenances," nor is it recited that such sum would equal that sum plus the proportional share of the property for the balance of the cost. An assessment was levied pursuant to the ordinance, to which objections were filed by certain of the interested property holders. The objections were disallowed by the council. Appeal therefrom was taken by certain of the objectors to the superior court, which, after a hearing, entered a judgment setting the assessment aside and remanding the cause to the city council with instructions to reassess the property "in the manner and mode provided by law."

On the remand of the cause to the city council, that body, by resolution, ordered a reassessment of the property. The resolution did not specify with any minuteness how the reassessment was to be made, and the officer selected for that duty seems to have spread the assessment over the property much the same as before. He levied a fixed proportion of the costs on the property between the termini of the sewer and bordering thereon, and distributed the remainder over the property included within the so-called enlarged district. Exception was again taken to the assessment roll by interested property holders, which the city council overruled. Appeal therefrom was taken to the superior court, where the objections were again overruled and the roll confirmed. This appeal is from the order of confirmation of the superior court.

In this court the appellants have assigned numerous errors, all of which are pressed upon us with earnestness and ability. We shall not, however, notice them in detail, nor in the order in which they are presented, as they suggest certain general questions, which can best be noticed in their general form.

The first assignment to be noticed raises the contention that the city council was without jurisdiction to order a reassessment of the property, because of the numerous departures from the statute made by the city council in the original

proceedings under which the trunk sewer was constructed. Most of these departures we have heretofore pointed out, and without enumerating further, it may be conceded that they justified holding invalid the original assessment. We are constrained to hold, however, that they were not sufficient in effect to prevent the court from directing a new or reassessment of the property. In the early case of *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364, construing the statute of 1893, which provided for a reassessment to pay the cost of a public improvement where the original assessment had been held void, it was held that the "legislature intended to provide for a reassessment in all cases where the assessment had been held to be void, whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done," and that such legislation was constitutional. The principle on which the case rests has been reannounced by us in many subsequent cases, and is now established law in this state. *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487; *Franklin Sav. Bank v. Moran*, 19 Wash. 200, 52 Pac. 858; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 231, 55 Pac. 630; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106; *Kuehl v. Edmonds*, 85 Wash. 307, 148 Pac. 19; *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448; *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1016.

The existing statute relating to assessments for local improvements is fully as broad in its provisions as the statute of 1893; it especially provides for a new or a reassessment whenever the original assessment is for any reason declared void; the part thereof particularly applicable to the present proceeding reading as follows:

"Whenever any assessment for any local improvement in any city or town, whether the same be an original assessment,

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assessment upon omitted property, supplemental assessment or reassessment, heretofore or hereafter made, has been or may hereafter be declared void and its enforcement [refused] by any court, or for any cause whatever has been heretofore or hereafter may be set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall make a new assessment or reassessment upon the property which has been or will be benefited by such local improvement, based upon the actual cost of such improvement at the time of its completion." Laws of 1911, p. 469, § 42 (3 Rem. & Bal. Code, § 7892-42).

It was, therefore, within the province of the trial court, on setting aside the original assessment, to order a reassessment, and within the province of the city council to make such an assessment, notwithstanding some of the errors in the original proceedings may properly be termed jurisdictional.

The next contention is that the contractor was allowed for the finished work a greater sum than that to which he was justly entitled under the contract, and that the sum attempted to be assessed against the property of the district is, because thereof, too large. The evidence chiefly relied upon to support this contention is the report of the city engineer. This, as we have said, allowed the contractor the sum earned under the contract up to a certain point in the work, according to the prices fixed per unit for the pipe in place, and from thence on the actual cost of the work with ten per centum added. But as we read the record, the city did not settle with the contractor on the basis of the engineer's report. During the course of the work, a condition was encountered, not foreseen or contemplated when the contract was entered into, which necessitated changes in the original plans and which materially increased the cost of the work. In the final settlement, this condition was taken into consideration, and the contractor paid upon the basis of the contract price with an allowance for the extra services; the result being a less allowance than the engineer returned,

but an increase over the contract price if calculated alone upon the basis of the bid for units in place. Clearly there was no error in this. The contractor was entitled to this extra compensation, not only on the principle of natural justice, but by the express terms of the contract itself, which made provision therefor. Whether the amount allowed is excessive or otherwise is not open to inquiry in this proceeding. No fraud or collusion between the city and the contractor in making the settlement is either alleged or proven, and the rule in such cases is that the determination of the amount earned under the contract by the city authorities is conclusive upon the property holders. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

For a like reason, there was no error in the ruling of the court in refusing to permit the witness Coe to testify to the cost of the sewer based upon the contract price. Since it was within the power of the city authorities to determine the question of the amount of the cost, the finding of the city authorities upon that question was, as we have said, conclusive.

The property of certain of the objectors was not included in the assessment district as described in the original resolution of the city council wherein it declared its intention to order the construction of the sewer, but was brought in under the amendatory ordinance providing for an enlarged district. It is the contention of the appellants owning such property that it was improperly included therein, as the statute relating to the creation of assessment districts to pay the cost of constructing trunk sewers does not contemplate the creation of enlarged districts. Since the statute relating to the construction of a trunk sewer (Laws of 1911, p. 449, § 15; 3 Rem. & Bal. Code, § 7892-15) provides that any district created to bear the assessment for such purposes "shall be outlined in conformity to topographical conditions, and . . . shall include as near as may be all the territory which

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can be sewerred or drained through such trunk sewer and the subsewers connected thereto," it would seem that any district created in conformity with the statute could not be enlarged, as such enlargement must of necessity embrace property not capable of sewerage or drainage through the sewer. But we think that, if the assessment district originally created did not include all of the property susceptible of sewerage or drainage through the contemplated sewer, the city could by proper proceedings, so enlarge the district as to include the omitted property, and it would make but little difference what terms it employed to denominate the new district. But this question is of no moment in the present controversy. This was a reassessment, made after the court had declared the original assessment invalid and had ordered such reassessment to be made. In such cases the city is specially authorized by statute (Laws of 1911, p. 469, § 42; Id., § 7892-42), "to assess or reassess all property which the council shall find to be specially benefited, . . . whether or not such property so to be assessed or reassessed . . . was included in the original assessment district." It is also provided (§ 43):

"The fact that the contract has been let or that such improvement shall have been made and computed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of law, the charter or ordinances governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or in any way affect the making of any assessment authorized in the preceding section: Provided, That such assessment shall be for an amount which shall not exceed the actual cost and expense of the improvement, together with the accrued interest thereon, it being the true intent and meaning of this act to make the cost and expense of local improvements payable by the property specially benefited thereby, notwithstanding the pro-

ceedings of the council, board of public works or other board, officer or authority of such city or town may be found irregular or defective, whether jurisdictional or otherwise; when such assessment is completed, all sums paid on the former attempted assessment shall be credited to the property on account of which the same were paid." 3 Rem. & Bal. Code, § 7892-43.

If, therefore, the property of these objectors is so situated that it can, by the construction of lateral sewers, be sewerred or drained through the trunk sewer as constructed, it is subject to assessment to pay the cost regardless of the question whether the attempt of the city council to include it in the original assessment district was effective or otherwise.

Finally, the appellant contends that the reassessment was made upon a fundamentally wrong basis, and this objection we are constrained to hold is well taken. As we have said, after the original assessment had been declared invalid by the judgment of the superior court, the city council directed a new or reassessment to be made by passing a resolution to that effect. The statute provides (Laws of 1911, p. 469, § 43; Id., § 7892-43) that the city shall proceed with any such assessment "by passing an ordinance ordering the same." Elsewhere in the statute the wording makes it clear that the legislature did not use the terms "resolution" and "ordinance" interchangeably. Nowhere is it said that a particular action may be taken by "resolution or ordinance," but in every instance specific directions are given as to the manner in which action shall be taken; that is, the direction is that the particular action shall be taken by resolution, or that it shall be taken by ordinance, not that it may be taken either by resolution or ordinance.

There may not be in every instance any clearly discernible reason why the one method should be employed rather than the other, but it is sufficient that the statute so directs, and it is in virtue of the statute that the city is empowered to act in the premises at all. Seemingly, also, the statute con-

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templates that the ordinance establish the boundaries of the district to be reassessed, and direct the manner in which the assessment is to be distributed over such district. In this latter respect the direction of the statute should be followed. It should be directed that there be levied against the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the street or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances, and the remainder of the cost and expense distributed over and assessed against all of the property within the bounds of the entire district in accordance with special benefits and in proportion to area. This requirement of the statute is neither unreasonable nor unjust, and the city should not undertake to amend it. The abutting property required to bear the extra expense has the immediate benefit of the sewer, and is not thereafter liable to assessments for lateral or local sewers. The remaining property is not so situated. As to it the sewer is not of immediate use, and cannot be made so without the additional expense of the construction of lateral or local sewers, which the property must subsequently bear. In the end the burden equalizes.

Since, therefore, the new or reassessment was not ordered by ordinance as the statute requires, and since the assessment was not spread over the assessment district in the manner directed by the statute, we are constrained to hold the assessment invalid. The order of the trial court confirming the assessment is reversed, and the cause remanded with instructions to sustain the objections, without prejudice on the part of the city to levy a new assessment.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 12721. Department One. January 11, 1916.]

UNION MACHINERY & SUPPLY COMPANY, *Respondent*, v.
JAMES K. DARNELL, *Appellant*.¹

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION—ACTIONS. An oral promise to pay \$1,000 of the indebtedness of the promisee to another, in consideration of a mortgage securing an indebtedness of \$4,000 due to the promisor, is an original undertaking upon a valuable consideration, and not a promise to pay the debt of another within the statute of frauds; and an action may be brought thereon directly by the person for whose benefit it was made.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—RIGHTS OF STRANGERS. The rule excluding parol evidence to vary the terms of a written contract applies to strangers to the agreement in so far as they seek or assert rights based upon the contract, or originating in the contractual relation created by it.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—ADDITIONAL CONSIDERATION. Where a mortgage, complete and unambiguous in its terms, was given by a failing debtor to secure four certain notes, specifically described in the mortgage, the recital of the amount and character of the debt is invulnerable to parol attack in the absence of fraud or mistake, and it is incompetent to show by parol that, as an additional consideration for giving the mortgage, the mortgagee by a contemporaneous parol agreement undertook to pay the sum of \$1,000 upon the indebtedness of the mortgagor to a third person; since it varies the written contract by adding new terms and creating new burdens.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 10, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Brightman, Halverstadt & Tennant, and *Halverstadt & Clarke*, for appellant.

Walter S. Fulton, for respondent.

ELLIS, J.—Action upon an alleged promise of the defendant to pay to the plaintiff \$1,000 on an indebtedness owing

¹Reported in 154 Pac. 183.

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from John and George England, loggers, doing business as England Brothers, to the plaintiff. The material facts are as follows: In the year 1912, the England brothers were engaged in logging certain lands in Pierce county. To finance these operations, they borrowed from the defendant, Darnell, \$4,000, evidenced by three promissory notes, one for \$1,500, dated June 14, 1912, due one year after date, with interest at seven per cent, payable semiannually; one for \$1,000, dated July 1, 1912, due on or before one year after date, with interest at seven per cent per annum, payable at maturity; and the third for \$1,500, dated October 2, 1912, due six months after date, with interest at eight per cent per annum, payable at maturity. The first two notes were executed by both of the Englands and their respective wives, the third by George England and wife. At the time of the giving of the first of these notes, the England brothers gave a bill of sale of the timber to the defendant, by the terms of which they were permitted to cut and remove the timber. Operations continued under this agreement and a supplemental agreement of May 26, 1913, not now material, until the middle of June, 1913, but nothing was realized over and above the expense of operation to apply on the indebtedness.

In the meantime the Englands had become indebted to the plaintiff, Union Machinery & Supply Company, for logging equipment in a sum approximating \$3,000. The plaintiff was urging payment. Shortly prior to June 16, 1913, the defendant's notes being wholly unpaid, except six months' interest on the first, the first and last notes being due, and much of the timber having been removed, the defendant went to John England's home and had a conference with England and his wife, which resulted in their giving to the defendant a mortgage on their home to secure the three notes. This mortgage was executed on June 16, 1913, and omitting caption and acknowledgment, reads as follows:

"The mortgagors, John England and Mary E. England, his wife, mortgage to Jas. K. Darnell to secure the payment

of four thousand dollars lawful money of the United States, together with interest thereon at the rate of seven and eight per cent per annum until paid, according to the terms and conditions of three certain promissory notes, dated June 14, 1912, July 1, 1912, and October 2, 1912, respectively for \$1,500, \$1,000 and \$1,500, respectively, payable on or before one year after date, on or before one year after date, and on or before six months after date, respectively, with interest at 7%, 7% and 8%, respectively, to the order of Jas. K. Darnell the following described real estate; lot thirteen, block eleven in Seaview Park, situated in the county of King, state of Washington.

"This mortgage shall not be foreclosed before two years from this date.

"Dated this 16th day of June 1913.

"John England (Seal)

"Mary E. England (Seal)"

On the same day, and admittedly for the purpose of enabling England Brothers to continue their logging operations, the England brothers and the defendant entered into an agreement in writing with the plaintiff, signed by all of them, which, after reciting the indebtedness of England Brothers to the plaintiff and that the plaintiff had declined to extend further credit without security, provided as follows:

"That the boom of logs now in the water adjacent to said camp may be sold by them and the proceeds employed in the liquidation of current labor bills.

"That the next three booms of logs shall be handled by the Union Machinery & Supply Company, sold by them, and out of the proceeds they shall retain \$1,000 in cash on each of said three booms, and that after paying the expenses of transportation and sale the balance shall be paid by the Union Machinery & Supply Company to the order of said England Bros. and J. K. Darnell.

"Said \$3,000 shall apply on the indebtedness of England Bros. to the Union Machinery & Supply Company."

On the same day, the England brothers and Darnell gave to the plaintiff a chattel mortgage on the timber in question. Apparently Darnell signed this agreement and chattel mort-

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gage to give them precedence over his prior chattel mortgage on the timber. Thereafter the Englands sold one boom of logs, the plaintiff a second boom, and the third was disposed of by the Seattle Merchants and Credit Men's Association by common consent of the creditors of England Brothers, including the plaintiff. On July 17, 1914, plaintiff brought this action, alleging that, on June 16, 1913, when John England and wife gave the above mentioned mortgage to the defendant as additional security for the three notes, the defendant, for the purpose of securing such additional security and keeping the logging camp running, promised England and wife to pay to the plaintiff the sum of \$1,000 to apply on their indebtedness to the plaintiff. This alleged promise is the basis of the action. At the trial the plaintiff was permitted, over objection, to introduce the testimony of John England and wife and their daughter to the effect that, as a consideration for the execution of the mortgage, the defendant promised to pay \$1,000 of the indebtedness of the England brothers to the plaintiff. The defendant denied that any such promise was made, and testified, in substance, that the mortgage embodied the whole agreement between him and the Englands, and that the contract and chattel mortgage above referred to embodied the whole agreement between him and the plaintiff. The trial resulted in a verdict and judgment for the plaintiff. The defendant appeals.

The record and the assigned errors sufficiently present two contentions: (1) That the alleged contemporaneous agreement contravened the statute of frauds, in that it was an undertaking to answer for the debt of another and was not in writing; (2) that the evidence of the oral contemporaneous agreement was inadmissible, in that it tended to change, vary and enlarge the terms of a written contract complete and unambiguous on its face.

I. The law is well settled in this state that a promise, for a valuable consideration, made by one person to another to pay such other's debt to a third person is an original un-

dertaking of the promisor, and is not such a promise to pay the debt of another as to come under the ban of the statute of frauds, though resting in parol. *Nordby v. Winsor*, 24 Wash. 535, 64 Pac. 726; *Dimanick v. Collins*, 24 Wash. 78, 63 Pac. 1101. It is also well settled that, in such a case, the third person may sue the first directly upon the promise as one made for his benefit. *Nordby v. Winsor*, *supra*; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123. The first point raised is without merit.

II. But it does not follow that every such promise may be proved by parol evidence. If the promise is asserted to have been made as a part of a transaction which is evidenced by a formal written contract complete and unambiguous upon its face, it is elementary that, as between the parties to the writing, parol evidence would be inadmissible to prove any additional promise which would tend to contradict, vary or enlarge the terms, scope or purpose of the written contract. *Ross v. Portland Coffee & Spice Co.*, 30 Wash. 647, 71 Pac. 184; *Allen v. Farmers & Merchants Bank of Wenatchee*, 76 Wash. 51, 135 Pac. 621. The same rule excluding parol testimony which applies as between the parties to a written contract applies with like force to a third person whenever he claims as a beneficiary under a contract, bases his claim upon it, or seeks to assert rights which originate in the contractual relation created by it. All rights primarily arising from the negotiations on which the written instrument rests, by whomsoever asserted, are merged in the writing. The fountain cannot rise higher than its source. In such a case, the third person, who claims that the promise was made for his benefit, is affected by the same principles of estoppel to vary the contract as evidenced by the writing as affect the party who claims to have paid the consideration for the promise. Jones, after indicating that the general rule excluding parol testimony to vary a written contract does not apply as against strangers to the instrument, says:

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"It is to be observed, however, that the *right of a stranger to vary* a written contract by parol is *limited to rights which are independent of the instrument*. So that where one, although not a party to the instrument, bases his claim upon it, and seeks to render it effective in his favor as against the other party to the action, by enforcing a right originating in the relation established by it, or which is founded upon it, the parol evidence rule applies." 3 Jones, Commentaries on Evidence, p. 220, § 449.

The following authorities amply sustain and exemplify the exception as stated: *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245; *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390; *Current v. Muir*, 99 Minn. 1, 108 N. W. 870; *Schneider v. Kirkpatrick*, 80 Mo. App. 145; *Selchow v. Stymus*, 26 Hun (N. Y.) 145; *Hankinson v. Riker*, 10 Misc. Rep. 185, 30 N. Y. Supp. 1040; *Schultz v. Plankinton Bank*, 141 Ill. 116, 30 N. E. 346, 33 Am. St. 290; *Wodock v. Robinson*, 148 Pa. St. 503, 24 Atl. 73. For an antithetical case stating this exception and illustrating its limits, see our own decision in the case of *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041.

As to the foregoing propositions, there can hardly be a divergence of opinion. But the respondent contends that the real consideration for a written contract can always be shown; that evidence of the parol contemporaneous promise of the mortgagee in this case to pay \$1,000 of the mortgagor's debt to it as an additional consideration for the mortgage, was therefore admissible, or as respondent, in substance, puts it: The execution of security for appellant's notes was the consideration for the promise; which comes to the same thing. Though an additional consideration not inconsistent with that expressed in the written contract may usually be proved by parol evidence, it is not competent, as between the parties to a writing, under the guise of proving an additional consideration, to engraft upon a written agreement, complete and unambiguous on its face, new terms, con-

ditions and covenants by parol. *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163; *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186; *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Jackson v. Chicago, St. P. & K. C. R. Co.*, 54 Mo. App. 636; *Walter v. Dearing* (Tex. Civ. App.), 65 S. W. 380; *Kahn v. Kahn*, 94 Tex. 119, 58 S. W. 825; 17 Cyc. 659.

As sustaining the admissibility of evidence of a contemporaneous parol agreement as an added consideration of a written contract, respondent cites four of our own decisions: *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964; *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892; *Windsor v. St. Paul, Minn. & M. R. Co.*, 37 Wash. 156, 79 Pac. 613. An examination of these cases discloses the fact that the first two involve bills of sale of personalty, and the last two, deeds conveying real estate. The tendency of modern authority is towards the doctrine that the effect of the acknowledgment of payment of a given consideration in a deed is only to estop the grantor from asserting a total lack of consideration and thus defeating the deed, and that the usual consideration clause is of no greater force than a separate receipt for the money, hence it is open to explanation by parol evidence. 3 Jones, Commentaries on Evidence, § 469. This is because *the prime purpose of a deed is to convey title*, and any explanation or variation of the consideration expressed, short of proving that the deed was without consideration, does not tend to defeat that purpose. *Ordway v. Downey*, and *Windsor v. St. Paul, Minn. & M. R. Co.*, *supra*. The same rule and reason applies in case of a bill of sale of personalty. *Don Yook v. Washington Mill Co.*, *supra*; *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934.

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It is matter of common knowledge that in conveyancing, the acknowledged consideration in the deed is often, and it may be said, usually not the real consideration paid or agreed to be paid. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103. But where, as in this state, a mortgage is not a conveyance with a defeasance as it was at common law, but is the mere written evidence of a contract of security, *its prime purpose being to secure a debt*, it seems to us that when the parties have specifically described the debt by stating the amount, as evidenced by specific notes, rate of interest, time of payment, and all the terms essential to a complete and unambiguous agreement, the recital of the amount and character of the debt should be held as invulnerable to parol attack as any other of the terms of the instrument, so long as the integrity of the instrument is not assailed for fraud nor a reformation sought for mistake. Such recitals as those found here are not mere "inattentive recitals common in conveyancing." They evidence, by their very particularity of description of the notes secured, a contractual intention as binding as any other contract.

"It is a universal rule that the written contract itself must be resorted to as the source of authority for receiving parol evidence, and where, as here, the contract shows a deliberate agreement complete in itself and formally executed, parol evidence to enlarge its scope or vary its terms is never admissible." *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 Pac. 621.

See, also, *Gordon v. Parke & Lacy Machinery Co.*, *supra*; *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515. To this rule neither a deed nor a mortgage is any exception. 6 Am. & Eng. Ency. Law (2d ed.), p. 775.

Even in case of a deed, when the statement of the consideration passes beyond the mere recitative acknowledgment of payment of money, common in conveyancing, and enters into specific details and conditions stipulating special terms evidencing not merely an intent to convey land, but to *contract*

with reference to the consideration, such recitals bind the parties, and if complete on their face, can no more be altered, varied, enlarged or controlled by parol evidence of a contemporaneous oral agreement than other contracts. *Jackson v. Chicago, St. P. & K. C. R. Co., supra*. In the case last cited, Judge Ellison, speaking for the court, says:

"All written contracts, complete and definite, speak for themselves and they cannot be altered, added to or subtracted from by oral testimony. This is an absolute rule of evidence adopted from motives of policy and founded upon the experience of mankind in dealing with the 'slippery memory' of men. So that it must follow that if parties express their contracts, as to the consideration, in terms which show that it is a contract, then, if complete upon its face, it can no more be altered or varied than any other contract. Whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction. This may be illustrated: Suppose the consideration in a deed should be: 'In consideration of the sum of one thousand dollars to be paid to me in beef cattle weighing not less than one thousand two hundred pounds each, at five cents per pound.' Would it be contended that a consideration thus expressed contractually could be orally shown to be other than as expressed? . . .

"But money may also be contracted for as the consideration in a written contract. And when the intention to so contract is disclosed by the written instrument, no other or additional consideration can be shown. Thus, suppose that the consideration was stated in the written contract to be 'one thousand dollars to be paid as follows: Two hundred dollars in six months from date without interest; four hundred dollars in twelve months from date with three per cent interest; and four hundred dollars in eighteen months from date with ten per cent interest from maturity; all to be secured by a mortgage on certain described property. Could it be shown in contradiction to this that the consideration agreed upon was fifty head of cattle or an additional sum of money? Clearly not. The reason is that it has been contracted otherwise by the parties and that contract has been reduced to writing."

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Where a deed recited the consideration as the payment of a certain sum of money and the assumption by the grantee of certain specifically described debts of the grantor, it was held that the statement of the consideration was contractual and that parol evidence was not admissible to show the assumption of other debts as an additional consideration. *Walter v. Dearing*, and *Kahn v. Kahn, supra*; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497. The better considered authorities hold, and it seems to us *a fortiori*, that the same rule applies to mortgages. While we have found no case an exact parallel to the one before us on the facts, there are many which announce the governing principle. In *Dyar v. Walton, Whann & Co.*, 79 Ga. 466, 7 S. E. 220, it was claimed by the mortgagor that a settlement closed up by absolute notes and mortgages was, by a contemporaneous oral agreement of the parties, to be revised by crediting all errors. Evidence to that effect was held inadmissible. The court said:

"The defense, when analyzed, resolves itself into an effort to vary a written contract by parol, and to shun the consequences of gross negligence. If at the time the notes and mortgages were given there was an agreement entered into, that they should be varied by the result of subsequent examination, that agreement ought to have been embodied in the written contract, or in some other writing whereby to establish it. The omission to do either is decisive of this branch of the defense. There is no allegation in the plea, and no indication in the evidence, that this agreement was intended to be embraced in any writing, or that it was left out by fraud or mistake."

In *Kenney v. Aitken*, 9 Daly (N. Y.) 500, the deed of trust involved was given to secure the payment of four specifically described notes. The maker of the trust deed brought an action upon an alleged contemporaneous parol agreement with the *cestui que* trust that the latter should repay to him the \$400 represented by the last note, as the value of cer-

tain property covered by the trust deed which was exempt from execution. Van Brunt, J., said:

"In the case of *Cocks v. Barker*, 49 N. Y. 107, it was held that the recital in the bond of a fact, although the existence of that fact formed the consideration of the execution of the bond, was a substantive part of the agreement, and not like the consideration clause of a conveyance or other instrument which might within certain limits be explained and varied by parol.

"The plaintiff in this action seeks to add to the deed of trust another and different agreement from that which is contained in the recitals."

That case, on principle, cannot be distinguished from the one before us. See, also, *Union Nat. Bank v. International Bank*, 22 Ill. App. 652; *Falke v. Fassett*, 4 Colo. App. 171, 34 Pac. 1005; *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399; *Bowery Bank of New York v. Hart*, 77 App. Div. 121, 79 N. Y. Supp. 46; *Knight v. Warren*, 56 Hun 641, 9 N. Y. Supp. 380; *Cocks v. Barker*, 49 N. Y. 107.

While it is competent to prove by parol evidence that a deed absolute on its face was intended as a mortgage, or, by an allegation of fraud or mistake, to open the door to the fullest investigation as to the real intention of the parties to a written contract and thus defeat or reform it, the facts must be pleaded and the proof must be clear and convincing. These are well recognized exceptions to the general rule excluding parol testimony. The first of these is *sui generis*; the second is not peculiar to mortgages but applies to every kind of written contract. Neither is authority for the claim that an instrument purporting to be a mortgage, complete upon its face and unambiguous as to the amount and character of the debt secured, is any more subject to variation, extension or contradiction by parol evidence than are other less formal contracts. To hold otherwise would render what commonly has been considered the surest security for a debt the most precarious.

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When a mortgage is given to secure a sum of money the receipt of which is acknowledged generally as in the usual consideration clause of a deed, parol evidence is admissible to show that it was given to secure future advances, and the actual amount of such advances, or to otherwise explain the nature of the debt intended to be secured. *Babcock v. Lisk*, 57 Ill. 327. So, also, where a mortgage is given to secure a specific note described therein, parol evidence is admissible to prove the true consideration of the note and what debts the note is intended to evidence. *Wilkerson v. Tillman*, 66 Ala. 532.

But the case here is neither of these. We have been cited to no authority, and know of none, holding that, where a mortgage is given to secure a certain indebtedness specifically described therein, the character and components of which are known and admitted, it is competent, without any allegation of fraud or mistake, to prove that, by a contemporaneous parol agreement, it was intended to secure a debt of a wholly different origin and character, or an additional sum to be advanced by the mortgagee as an additional consideration for the mortgage. Much less is it competent to prove that, by such an oral agreement, an additional sum was to be paid as an additional consideration without any intention that it should be secured by the mortgage. Such proof in either case would not be proving the consideration merely, but varying and enlarging the contract by adding new terms and conditions and creating new burdens. We said in *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186:

“Lastly it is contended that the court erred in excluding evidence as to the consideration that actuated the appellants in entering into the lease. But such evidence was immaterial to any issue made by the pleadings. While it is permissible for certain purposes to show by parol what the actual consideration was upon which a deed is founded, it is never permitted where the purpose of the evidence is to annex a condition to the instrument not expressed in it.”

There is no reason, either in law or logic, why the same rule should not apply to a mortgage complete in every particular on its face. It will not do to say that the alleged agreement was a separate and independent contract. Clearly, the promise here sought to be enforced, if independent of the mortgage, was without consideration, since the respondent on the same day agreed in writing, not only with the Englands, but also with the appellant, *on another consideration*, to extend credit and permit the logging operations to continue. The alleged promise to pay the \$1,000 could not have entered into that agreement in any view of the case, since the respondent does not claim to have known of it until long afterwards.

We have gone into the matter thus fully for the reason that we are now satisfied that in the case of *Harbican v. Skinner*, 83 Wash. 596, 145 Pac. 582, we permitted ourselves to indulge a breadth of expression beyond the true rule and beyond the necessities of that case. That case was decided correctly, but should have been based alone upon the last ground stated in the opinion. The mortgage gave the mortgagee the option of paying the taxes, assessments and insurance premiums, and carrying the same under the mortgage at his election. Parol proof that, at the time the mortgage was given, certain assessments and premiums were due, and that he then elected to exercise the option to pay and carry these items, did not tend to change, add to or vary either the mortgage or the consideration upon which it was based. In the case before us, we are clear that the oral evidence of the alleged contemporaneous promise sued upon was improperly admitted.

The judgment is reversed, and the cause is remanded with direction to dismiss.

MORRIS, C. J., CHADWICK, MOUNT, and FULLERTON, JJ., concur.

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[No. 12736. Department Two. January 11, 1916.]

JOHN M. BEMISS, *Respondent*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, *Appellant*.¹

CARRIERS—INJURY TO PASSENGERS—TAKING ON PASSENGERS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. In an action for personal injuries to an intending passenger, struck by a rapidly approaching east-bound street car, while he was about to board a west-bound car on the other track, it cannot be said, as a matter of law, that the proximate cause of the injury was his contributory negligence in standing on or near the track without taking any precautions as to the cars approaching thereon from the opposite direction, if the motorman either saw, or by the exercise of proper care should have seen, him in time to have slackened the speed of the car and avoided the injury; but the question is for the jury, where the east-bound car was approaching at full speed without warning and without any attempt to stop it until within ten feet of the plaintiff.

Appeal from a judgment of the superior court for King county, Humphries, J., entered October 20, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a street car. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant.

Walter S. Fulton, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendant. In the answer, the negligence was denied and contributory negligence on the part of the plaintiff was affirmatively pleaded. The affirmative defense was denied by a reply. Upon the issues thus framed, the cause was tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$6,000. Judgment being entered upon the verdict, the defendant appeals.

¹Reported in 154 Pac. 171.

The assignments of error challenge only the sufficiency of the evidence to sustain the verdict. The facts which were either admitted or which the jury had a right to find from the evidence introduced, are substantially as follows: At about 7 o'clock a. m., on December 31, 1918, the respondent, at the intersection of Yesler Way and Twenty-seventh avenue, in the city of Seattle, was struck by a street car operated by the appellant, and sustained a severe injury. Yesler Way is a street running from the business section of the city in an easterly direction. Twenty-seventh avenue extends north and south and intersects Yesler Way at right angles. Both streets at the place of the accident were paved.

The appellant owns and operates a double track cable street railway on Yesler Way, the cars being propelled by an underground cable which is operated at a speed of ten miles an hour, and when going at full speed, the cars are operated at the speed of the cable. The outbound cars are operated upon the southerly track and the inbound cars upon the northerly track. The distance between the inside rails of the two parallel tracks is seven feet. The cars operating upon the tracks overlap the tracks a distance of thirty and one-half inches, and as the two cars pass each other on the parallel tracks, the nearest point between the outsides of their running boards is twenty-three inches. The cars operated upon these tracks have an enclosed portion in the middle, and on each end an open section. On each side of the open section is a long seat running lengthwise of the car and facing outward, which seat is reached by a running board one step below the floor of the car. Passengers are allowed to board and alight from the cars from either the front or rear section.

At the time of the accident in question, and for some years prior thereto, the respondent had lived to the south of Yesler Way and a little to the east of Twenty-seventh avenue. It had been his custom in going to his business in the morning to take the westerly or inbound Yesler Way car at Twenty-

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seventh avenue and Yesler Way. On the morning in question, when he reached the corner of Yesler Way and Twenty-seventh avenue, he observed the inbound car about one hundred and fifty feet to the east. He then crossed the street and stood upon or near the south track waiting for the car to approach, when he would board it at the front open section, as he usually did. In crossing the street, he gave no attention to any other car that might be coming from the west. When the inbound car approached the respondent, it stopped for the purpose of receiving him as a passenger, he then being opposite the south side of the rear section of the car, the front open section having passed him. While in this position, and before he boarded the car, another car approaching from the west struck him, causing the injury complained of. This latter car was proceeding at full speed without warning, and no attempt was made to stop it, or slacken its speed until it was within approximately ten feet of the place where the respondent was preparing to board, or in the act of boarding, the inbound car. After striking the respondent, the car ran practically its full length before it was stopped; the rear open section, after the car stopped, overlapped the rear open section of the inbound car. It was a dark and rainy morning, but was sufficiently light so that the motorman on the outbound car could have seen the respondent when he was approximately one hundred and fifty feet distant. It was the custom for west-bound cars at this point to receive passengers from the south side. No objection at any time was interposed by the appellant to passengers boarding the car from that side.

At the conclusion of the respondent's case, the appellant moved for a nonsuit; and at the conclusion of all the evidence, challenged the sufficiency of the evidence and moved for a directed verdict. These motions were denied.

The appellant's principal contention is that the respondent was guilty of contributory negligence in standing on or near the south track without taking any precautions to avoid

being hit by a car coming from the west upon that track. The respondent claims that the appellant was guilty of negligence in that the car upon the outbound track approached the place where the respondent was boarding the inbound car at full speed. Notwithstanding the fact that the respondent may have been guilty of negligence in failing to take any precaution for his safety while he was waiting to board the inbound car, if the motorman upon the outbound car either saw, or in the exercise of a proper degree of care could have seen, him in time to have slackened the speed of the car, and thus have avoided the accident, it cannot be held, as a matter of law, that the negligence of the respondent was the proximate cause of the injury. The question was for the jury. *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534; *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941.

The case cited by the appellant which is most nearly in point in sustaining its contention is *Miller v. St. Paul City R. Co.*, 42 Minn. 454, 44 N. W. 533. A careful reading of that case will disclose a material difference in one respect between the facts there and the facts in this case. But even though the holding in that case would support the contention of the appellant here, it would not be controlling. Under the facts in the present case, it is ruled by the cases of *Morris*, *O'Brien*, and *Mosso*, *supra*.

The judgment will be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and ELLIS, JJ., concur.

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[No. 12792. Department Two. January 11, 1916.]

EFFIE E. SMITH *et al.*, *Appellants*, v. L. H. CRAVER *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—DELINQUENT ASSESSMENTS—SUMMARY FORECLOSURE—DEED—REDEMPTION — NOTICE TO "OWNER." There must be strict compliance with Rem. & Bal. Code, § 7808, providing, upon the summary sale of premises for delinquent local improvement assessments, that the notice of application for a deed be served personally upon the "owner," which means the real owner of the property, unless something has been done to work an estoppel; hence notice by publication, to the holder of the record title under an absolute deed intended as a mortgage is not sufficient to cut off the owner's right of redemption, where she had been in possession for more than ten years, was the record owner when the assessments were levied, her name appeared on the assessment rolls, and she lived in the immediate vicinity and could have been found if diligence had been used.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 16, 1914, upon sustaining a demurrer to the complaint, dismissing an action to set aside tax deeds, tried to the court. Reversed.

Barker & Rozema, for appellants.

A. C. MacDonald, for respondents.

PARKER, J.—The plaintiffs, Effie E. Smith *et al.*, seek to have set aside two tax deeds issued to the defendant L. H. Craver by the city treasurer of the city of Seattle, for lots 11 and 12, respectively, of block 8, Evans & Blewett's addition to the city of Seattle. The deeds were issued upon delinquent eminent domain local improvement assessments and certificates of delinquency issued therefor, and are claimed by the defendants to rest upon valid proceedings regularly had under Rem. & Bal. Code, § 7808 (P. C. 171 § 111), relating to such delinquent assessments. The defendant L. H. Craver demurred to the plaintiffs' complaint upon the ground

¹Reported in 154 Pac. 156.

of insufficiency of facts to constitute a cause of action. The demurrer was by the court sustained, and the plaintiffs, electing to not plead further, judgment of dismissal was rendered against them, from which they have appealed.

The controlling facts may be summarized from the allegations of the complaint as follows: Appellant Effie E. Smith was the actual and also the record owner of the lots at the time of, and long prior to, the issuance of the delinquent certificates here involved. Her name appeared upon the assessment rolls as the owner of the lots, and her name also appeared on the delinquent certificates as the owner of the lots. In November, 1912, after the issuance of the delinquent certificates, George E. Gowen became the apparent record owner of the lots. While the conveyance to him was by deed absolute in form, it was intended as a mortgage only, to secure a loan of \$445 made by him to appellant Effie E. Smith. The record of this deed in the office of the auditor of King county made him the apparent record owner of the lots.

In April, 1913, respondent L. H. Craver, having then become the owner by assignment of the certificate of delinquency against lot 11, gave notice to George E. Gowen, by publication, of his intention to apply to the city treasurer for a deed to that lot if not redeemed within sixty days from the date of the first publication of the notice. In April, 1913, M. L. Ash, the original holder and then owner of the certificate of delinquency against lot 12, gave notice to George E. Gowen, by publication, of his intention to apply to the city treasurer for a deed to that lot if not redeemed within sixty days from the date of the first publication of the notice. Thereafter, respondent L. H. Craver became the owner of that certificate of delinquency by assignment from M. L. Ash. These published notices were addressed to George E. Gowen only. They were evidently so addressed and given upon the assumption that George E. Gowen was the owner of the lots and the only person to whom notice of application for the

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deeds was required to be given. No other notice was given to any one.

Thereafter, respondent L. H. Craver filed with the city treasurer his affidavits stating, in substance, that he was the owner of the certificates; that notice had been given by publication to George E. Gowen; that George E. Gowen was the record owner of the lots; "that immediately before publishing the notice hereinafter referred to, affiant made and caused to be made diligent search for the said George E. Gowen, and that affiant has been unable to find him and believes that said George E. Gowen is not now within the state of Washington, and was not at the time of the first publication of the notice of application for a deed;" and that all other taxes against the lots had been paid. Respondent L. H. Craver thereupon demanded of the city treasurer that he issue deeds to him for the lots as holder of the unredeemed certificates of delinquency. Thereafter, on July 8, 1913, the city treasurer executed and delivered to respondent L. H. Craver a deed for each of the lots, the same not having been redeemed. No notice of any application for the deeds, or either of them, was ever given to appellant Effie E. Smith, nor did she have any actual notice or knowledge thereof. Thereafter, appellant Effie E. Smith, for the purpose of effecting a redemption from the sale of the lots, caused to be tendered to L. H. Craver the sum of \$425 in payment of the delinquent assessments for which the certificates were issued, including additional taxes and assessments paid by respondent Craver and his predecessor in interest, which tender was refused. In her complaint, Effie E. Smith offers to pay all taxes, assessments and lawful charges to whomsoever due for the redemption of the lots.

Touching the question of the necessity of notice to appellant Effie E. Smith of the applications for the deeds, giving her opportunity to redeem as owner of the lots, she alleged:

"That said plaintiff Effie E. Smith is now, and has been for more than ten years last past, the owner in fee simple and in possession of lots 11 and 12, block 3, Evans and Blewett's addition to the city of Seattle, in said county, as her separate property. . . .

"The plaintiff Effie E. Smith is now and has been for several years last past a resident of the city of Seattle aforesaid, and for a long time prior to the publication of said notice lived in the immediate vicinity of said lots 11 and 12, and her whereabouts and her ownership of said lots could have been ascertained at any time before the publication of said notice if any diligence at all had been exercised."

This action was brought about one year following the issuing of the deeds by the city treasurer.

No question is made as to the validity of the assessments, or the validity of the certificates of delinquency. The deeds were issued, as claimed by counsel for respondents, in accordance with procedure regularly had and notice given as prescribed by Rem. & Bal. Code, § 7808, which, so far as we need here notice its provisions, reads:

"Every piece of property sold for an assessment shall be subject to redemption by the former owner, or his grantee, mortgagee, heir or other representative at any time within two years from the date of the sale . . . Should no redemption be made within said period of two years, the treasurer shall, on demand of the purchaser or his assigns, and the surrender to him of the certificate of purchase, execute to such purchaser or his assigns, a deed for the piece of property therein described: Provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate, and that he will demand a deed therefor; and if, notwithstanding such notice, no redemption is made within sixty days from the date of the service or first publication of such notice, said holder shall be entitled to said deed. Said notice shall be given by personal service upon said persons: Provided, that in case said parties are nonresidents of the state or they cannot be found therein after diligent search, then such notice may be given by publication in a weekly newspaper published in said city once each week

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for three successive weeks or if no newspaper be published in said city, then publication shall be made as provided in § 7792. Such notice and return thereto, with the affidavit of the person claiming such deed showing that such service was made, shall be filed with the treasurer. Such deed shall be executed only for the piece of property described in the certificate, and after payment of all subsequent taxes and special assessments thereon."

The principal contention of counsel for appellants is that Effie E. Smith was the owner of the lots at all times here involved, within the meaning of the provisions of § 7808 above quoted, requiring notice to be given to "*the owner*" by the holder of the certificate of delinquency of his application to the city treasurer for a deed, so as to furnish such owner an opportunity to redeem before the issuance of such deed. We are constrained to agree with this contention, assuming, of course, that the allegations of the complaint are true. Counsel for respondents proceed upon the theory that the notice need only be given to the record owner, that is, the record owner as shown by the instruments of conveyance of record in the county auditor's office; and that, since there was of record in that office a conveyance absolute in form for the lots from appellant Effie E. Smith to George E. Gowen, respondent L. H. Craver had the right to rely absolutely upon such conveyance as showing George E. Gowen to be the owner of the lots.

Now this law is silent as to who shall be deemed the owner for the purpose of giving notice of application for deeds, within the meaning of § 7808 above quoted. This law is, in this respect, unlike those tax laws which provide that, for the purpose of service of notice or process, those persons shall be deemed owners whose names appear upon the tax rolls or some other specified public record. This law uses the word "owner," in this connection, unqualifiedly; and we think it means the real owner, unless the real owner has done something which works an estoppel against him asserting that he is the real owner and, as such, entitled to notice fur-

nishing him an opportunity to redeem. It might be that, if the same name appeared as owner upon the assessment rolls, in the certificate of delinquency and in the record of conveyance in the auditor's office, and, in addition thereto, the lot was not in possession of anyone, such evidence of ownership would entitle the holder of the certificate of delinquency to a deed upon giving notice to such owner, regardless of who the true owner might be. But we have no such case here. We have seen that these lots have been in the possession of appellant Effie E. Smith for more than ten years past; that she was the record owner when these assessments were levied; that her name appears as owner upon the assessment rolls; that her name appears as owner in the certificates of delinquency; and that she now lives, and for a long time prior to the publication of the notices had lived, in the "immediate vicinity" of the lots. We think these are facts to which respondent L. H. Craver could not shut his eyes.

We are not dealing with the foreclosure of a general tax lien, a lien which the law itself furnishes to all owners, in a measure, an annual notice of its existence. But we are dealing with a local assessment lien, the creation of which the owner of the property charged may never have any actual notice, and which is sought to be foreclosed in this summary manner instead of by judicial process. More, this is an eminent domain local improvement assessment, for which property at some considerable distance from, and not abutting upon, the improvement may be assessed, so that the mere making of the improvement may not suggest to the owner that his property is to be assessed therefor, as it generally does where his property abuts directly upon an ordinary local improvement which he sees being constructed. Hence, the necessity which the law has always recognized in such cases of requiring the strictest compliance with the prescribed statutory prerequisites for the issuance of a deed divesting the owner of title in satisfaction of such an assessment. These observations suggest the exercise of great caution, and

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require strict adherence to the notice and procedure prescribed in § 7808 above quoted, before it can be held that the owner is divested of his title in satisfaction of such a local assessment by the issuance of a deed by the city treasurer; especially where the required notice furnishing the owner an opportunity to redeem is not personal but constructive only, as the notice here relied upon was.

In *Albring v. Petronio*, 44 Wash. 132, 87 Pac. 49, Justice Crow, speaking for the court, said:

"Our view is that this statute must be strictly construed as against the respondent; that he must be held to a complete and exact compliance with all of its provisions as a condition precedent to obtaining his deeds. Had he succeeded in giving personal notice to the appellants, a less stringent rule might be invoked in his behalf."

This observation, it is true, was made in connection with defects of procedure preliminary to the issuance of a deed by the city treasurer not exactly of the same nature as that here involved, but the principle involved is the same, and the statute there involved was, in substance, the same as the above quoted provisions from Rem. & Bal. Code, § 7808 (P. C. 171 § 111). *Loeb v. Asberry*, 44 Wash. 427, 87 Pac. 510, and *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 166, 105 Pac. 238, lend support to this view.

We are of the opinion that appellants' complaint states a cause of action, entitling them to redeem from the sale evidenced by the certificates of delinquency upon which the deeds of the city treasurer were issued. It follows that the sustaining of respondents' demurrer to appellants' complaint and the dismissal of the case were erroneous.

The judgment is reversed, and the cause remanded for further proceedings.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12882. Department Two. January 11, 1916.]

H. C. PAYZANT *et al.*, *Appellants*, v. B. F. CAUDILL *et al.*,
Respondents.¹

TRIAL—DIRECTION OF VERDICT—QUESTION FOR JURY. A directed verdict or judgment *non obstante* cannot be ordered where there is evidence on behalf of respondent upon an issue of fact determining the liability.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for a broker's commissions, it is not error to refuse an instruction defining a real estate broker and stating the law as to liability for commissions, where the court instructed the jury that plaintiffs were real estate brokers, had made the sale and procured an able and willing customer and were entitled to commissions unless they had agreed to make no charge for commissions, thereby reducing the issues to their ultimate.

BROKERS—ACTION FOR COMMISSIONS—ISSUES AND PROOF. In an action for a broker's commissions, instructions upon an issue as to whether plaintiffs had agreed not to charge any commissions are proper where a trade had been contemplated, and one of the brokers admitted that he offered to either make the exchange or sell the property for cash clear without any commission, making a price "cash net to them."

APPEAL—REVIEW—DISCRETION—NEW TRIAL. Where the trial court exercised its discretion in refusing to grant a new trial for insufficiency of evidence, as indicated by refusing the new trial after having first declared the evidence incredible and improbable, the discretion is not subject to review on appeal, in the absence of manifest abuse of discretion.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered February 27, 1915, upon the verdict of a jury rendered in favor of the defendants, in an action for a broker's commission. Affirmed.

Robert Mulvihill, for appellants.

E. C. Dailey, for respondents.

HOLCOMB, J.—Appellants' motion for a directed verdict in their favor, against respondents, having been denied and

¹Reported in 154 Pac. 170.

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the case submitted to the jury on the evidence, the jury found for the respondents. Appellants then unsuccessfully moved for judgment *non obstante veredicto*, or for a new trial.

I. The court should not have granted the motion for directed verdict or for judgment *non obstante veredicto* for appellants, for the reason that there was evidence on behalf of respondents on the one issue of fact which determined the respondents' liability, viz., whether, if the equity in respondents' property was sold to appellants or to any other person, at the price fixed therefor for cash, no commission was to be paid.

II. There was a contract between appellants and respondents, whereby appellants were to, and did, procure an exchange of certain property owned by a Mrs. Austin, valued at \$2,600, for an equity of respondents in certain other property over and above a certain mortgage of \$2,900, which equity was valued at \$2,600, and for which appellants agreed to accept a commission of \$200. Respondents, by letter and wire, agreed to the exchange on the precise terms stated by appellants, but proposed that appellants take \$50 in cash as part payment of their commission and take respondents' note for \$150, the balance, for six months. Mrs. Austin was ready, able, and willing to make the exchange, and in fact moved at once into the respondents' property. A Mrs. Wright was acting, in part, as agent for respondents, and she asserts that she was unable to procure the consummation of the exchange from appellants because they "insisted on having all their commission in cash, and would not turn the Austin property over until they got it; that the negotiations between her and appellants continued from September 19 to October 28."

As the case developed under the evidence, the court instructed the jury to the effect that,

"Under the undisputed evidence and the admissions in the pleadings, the defendants entered into the contract for the exchange of their property for the property described in the

contract [Mrs. Austin's], and upon stated terms; that the undisputed evidence in the case is that plaintiffs obtained such purchaser according to the contract, and respondents' property was actually sold by appellants and possession delivered to Mrs. Austin, for \$3,860; that, under the evidence, the appellants are entitled to the commission, not exceeding \$210, *unless you further find that the plaintiffs, subsequent to the execution of the original contract between plaintiffs and defendants, agreed with defendants that, if the sale was made for cash, the plaintiffs would charge no commission for the sale.*"

The court also further instructed that:

"Really the only issue submitted to you in this case is the question whether or not the plaintiffs did agree, subsequent to September 19, 1914, that, if a sale of the Caudill property was made for cash, they would charge no commission for making such sale. If you should find that the plaintiffs so agreed, then your verdict should be for the defendants."

Thus were the issues reduced to their ultimate in giving the case to the jury. There was, therefore, no error in refusing the instructions tendered by appellants, defining a real estate broker and stating the law as to when a real estate broker is entitled to his commission. The instructions given referred to the jury but one issue, which expressly stated that appellants had been made the brokers or agents of respondents; that they had made the sale, procured a buyer who was ready, able, and willing to comply with the terms of sale, and were entitled to their commission, unless there had been a subsequent alteration of the original contract. The manner of submission to the jury was entirely favorable to the appellants, unless the court erred in submitting the one issue to the jury that was submitted. Upon this, appellants say that there was no issue for the jury; that the lower court submitted an issue as to which there was no evidence to support it, viz.: "Did the appellants agree that they would not charge any commission if the sale was made for cash?" It is asserted that the testimony is to the effect that appellants

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would purchase the Austin property after the trade was made, and if the appellants purchased any of the property they would not receive any commission; that they were not to receive a commission if they purchased, and this was all the evidence on a cash sale; that the appellants did not purchase the property; that the burden was upon the respondents to show, by clear and substantial evidence, that appellants made a contract by which they were to perform services and receive no pay.

While it is a fact that the facts as testified to by Mrs. Wright, the agent for respondents, would seem to be improbable, yet one of appellants, Mr. Smith, testified as follows:

“Question: Isn’t it a fact, that when you showed them the Lowell [Mrs. Austin’s] property, you told them that they could either have the Lowell property, or you would sell the Lowell property and pay his equity in cash clear, without any commission? Isn’t that true, Mr. Smith? Answer: Yes, this thousand or eleven hundred dollars would have been the amount net to them without a commission. Q. Without a commission? A. Yes, sir; and that is what—for your information, that is what I was trying to do, this thirty days; was to get them that cash net to them.”

The Lowell, or Mrs. Austin’s property, was sold, according to appellants’ testimony, and appellants furnished the money to pay cash for the equity, and improbable as it would otherwise seem, it may be inferred that no commission was to be paid. We think, therefore, that the court properly submitted this issue to the jury.

III. The same question, in effect, is raised in argument in support of appellants’ motion for a new trial. It appears that the trial judge, in passing upon appellants’ motion for a directed verdict, very forcibly intimated that the testimony that, if the sale was made for cash, no commission was to be charged, was improbable and incredible, and that in case the jury found otherwise, he felt that he would be impelled to set it aside. But in passing on a motion for a new trial, it seems that the trial judge, after further reflection and de-

liberation, concluded that the facts supported the verdict, probably considering that the jury were better judges of the credibility and probability of the truth of the testimony than was the court, and refused to grant a new trial. Having thus undoubtedly exercised his discretion, we are concluded. It is our province, under the repeated decisions of this court, to correct manifest abuses of discretion on the part of the trial courts in granting or refusing new trials, but not to interfere with the clear exercise of the discretion of trial courts.

There is no error. The judgment is affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

[No. 12889. Department Two. January 11, 1916.]

ALBERT WELCH *et al.*, Respondents, v. B. H. PETLEY *et al.*,
*Appellants.*¹

MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian in attempting to use a street which was in process of construction, on a dark night, is for the jury, where it appears that the contractor had but recently taken possession of the street, part of which he occupied, and had removed one of two wide planks constituting a narrow sidewalk elevated above the surface of the ground, without putting up any barrier, lights or warning, that the plaintiff was not aware that the plank had been removed and could not see on account of the darkness, that there were no barriers to indicate that the street had been closed to travel, and the testimony conflicted as to whether red lights were put up at the nearby street intersection at which plaintiff entered upon the street.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. Where the court has exercised its discretion in refusing a new trial, sought on the alleged subsequent developments as to the condition of the plaintiff in a personal injury case, the same will not be disturbed on appeal except for clear and manifest abuse of discretion.

¹Reported in 154 Pac. 145.

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Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 5, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained in a fall from a sidewalk. Affirmed.

E. P. Whiting, James E. Bradford, and F. M. Egan, for appellants.

Green & Chester, for respondents.

HOLCOMB, J.—Eighteen errors are assigned by the appellants, but they are argued under three general propositions: (1) Whether or not appellants were guilty of negligence; (2) whether or not respondent Ruby Welch was guilty of contributory negligence; and (3) whether the court erred in giving and in refusing certain instructions.

On and prior to June 20, 1914, Thirty-seventh avenue south, in Seattle, was a public street, with a plank sidewalk along the easterly side thereof for some distance south of Hudson street, consisting of two rows of wide planks laid parallel, and which had been used by respondents and pedestrians generally for a long time. At a point about ninety feet south of the south line of Hudson street, the plank sidewalk was elevated about twenty inches from the ground. The city had let a contract to Petley for the grading of Thirty-seventh avenue south, and on June 17, 1914, the contractor had taken possession of the street under his contract and, at the intersection of the street with Hudson street just south of the south line thereof, he had placed a platform on skids, nine feet nine inches wide and thirty-five or forty feet long, on which was mounted a donkey engine and boilers. Just north of the south line of Hudson street at its intersection with Thirty-seventh avenue south, a car of coal was placed on a track, and a large pile of coal was unloaded therefrom on the ground, close to the platform and extending across the center of the street, leaving space suffi-

cient at each end of the pile for the sidewalk and for teams to pass between the sidewalks and the coal pile up and down Thirty-seventh avenue south. There were cables extended, but left lying flat on the ground at the time mentioned, from the donkey engine south for some distance. The contractor removed one of the planks from the narrow sidewalk on the easterly side of Thirty-seventh avenue south, at the point about ninety feet south from Hudson street, where it was about twenty inches from the ground, and left no barrier or light or other warning to guard that place, and at that place, after night or on the night in question, it was very dark.

At about 10:30 in the night of June 20, Mrs. Welch left the southwest corner of the intersection of Hudson street and Thirty-seventh avenue south, walking very rapidly, or almost running, diagonally across Thirty-seventh avenue south, to the easterly side of the street, reaching the line of the sidewalk on that side a little distance north of the place where the plank had been removed, walked to that place, and not knowing previously, and not being able to see at the time, that the plank had been removed, stepped down, fell, and sustained severe injuries. A part of the contractor's work was to remove the plank sidewalk and grade and improve the street its entire width. Mrs. Welch had been familiar with the street and the sidewalk in this locality about three years, but had not been along there that day, and was unaware of the removal of a part of the walk. There was an arc light at the southeast corner of the street intersection mentioned, extending on an arm from a wire pole. There were incandescent lights further south on Thirty-seventh avenue, but none very near the place where the accident occurred. There was a conflict in the testimony as to what red lights were put up at the street intersection. It seems well established that there was one red light on the coal pile and one on the donkey engine. Respondents, and other witnesses in their behalf, testified that there was no warning red light at the entrance to the walk going south from Hudson street on Thirty-seventh

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avenue, no board nailed up, nor any sign, signal, or warning to indicate that the walk was not to be used by the public. There was no barrier or sign of any kind at the south end of the block to indicate that the street was closed to travel.

I. Appellants rely upon the decision in *Hunter v. Montesano*, 60 Wash. 489, 111 Pac. 571, Ann. Cas. 1912 B. 955; *Jones v. Collins*, 177 Mass. 444, 59 N. E. 64, and *Compton v. Town of Revere*, 179 Mass. 413, 60 N. E. 931, to the points that obstructions so placed, and of such nature as to be calculated to give ample notice to the public that the street was in process of construction and not open for travel, thereby suspended the legal liability for not keeping the street in a safe condition for travel; and that a person so traveling such street assumes the hazard incident thereto.

These contentions are sound, but do the facts here come within them? In the *Hunter* case, the street had been in process of construction for two or three months, of which plaintiff was well aware, being employed in the daytime in a livery stable situate thereon; the accident occurred upon a dark, windy, rainy night; he knew that the street was all torn up at the place where he attempted to travel; he knew that there was a barrier extending from curbing to curbing at each end of the block on Main street, which was being paved; he saw the barriers and knew the condition of the street. Assuredly, as was said by the court, per Gose, J., "he was guilty of the grossest negligence." In the case it was further pointed out that "Main street outside the sidewalk area was properly barricaded." Plaintiff in that case was not traveling upon the sidewalk area but in the main portion of the street.

In *Jones v. Collins*, *supra*, it was stated by the court there were barriers across each end of the street that was being improved, and across the ends of each street leading into it, and had been up for many days previous to the accident, and "were so placed and so numerous and of such a nature as to be well calculated to give ample notice to the public that the

street was in process of construction and was not open for travel."

In the *Compton* case, it was pointed out that:

"This is not the case of a person entering upon a street in the nighttime, which he has no reason to suppose defective, but of a person entering a street in the daytime, the grade of which he knows is being changed and which he also knows is not graded, or fit for public travel."

Again:

"It is obvious that the plaintiff knew all that there was to know about the condition of things; and, in attempting to use the street, did it at his peril."

These cases, therefore, all differ from the facts in the case now under consideration. From them, and many others in this and other states, as was said in the *Hunter* case, "The principle which may be deduced . . . is that a city is not required to so barricade a street as to preclude injury. It discharges the full measure of its duty when it gives a plain warning that there is danger in traveling a street."

But a street is often closed to travel as to its main body, or to teams and vehicles, and not as to its sidewalks or to pedestrians. The case of *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323 (also written by Judge Gose), is more controlling here. Plaintiff recovered against both the city and the contractor. On motion of the city, judgment *non obstante veredicto* was granted in its favor. It was said:

"We think the court erred in entering a judgment *non obstante* in favor of the city. Whether the appellant was guilty of contributory negligence is a question of mixed law and fact. There is abundant evidence in the record which justified the jury in finding that the public were traveling the two-plank way, where the appellant fell, with the knowledge and approval of the city. . . . Was the appellant exercising reasonable care in view of all the attending circumstances? The jury, upon competent testimony, resolved this question in her favor. Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care

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to keep it in a reasonably safe condition for travel. . . . A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. . . . Where a city undertakes to improve a street, it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street to public travel. . . . It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or in the exercise of reasonable care ought to have known, its condition."

Judgment in favor of plaintiff on the verdict was ordered. The case does not depart from the *Hunter* case, but is clearly distinguishable therefrom and from the other cases cited and relied upon.

In the present case, the evidence showed that other persons were using the street, and that a man and his wife traversed the same sidewalk area immediately after Mrs. Welch, and in fact discovered her in the depression into which she fell. It was a proper case to go to the jury upon the questions of the sufficiency of the barriers and other warnings to notify the public of the suspension of travel upon the sidewalk area, and also upon the question of the negligence of Mrs. Welch.

II. It was upon the foregoing theory that the court instructed the jury, and of which appellants complain. There was no error, therefore, in the giving and refusing of instructions by the court.

III. As to alleged subsequent developments as to the condition of Mrs. Welch, shown on motion for new trial, the court passed upon them as matters of fact, exercised his judicial discretion, and denied the motion. It has so frequently been held in this state that in such case, unless there is a clear and manifest abuse of discretion by the trial court, this court cannot and will not interfere, that no citation of cases is necessary.

Judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and BAUSMAN, JJ., concur.

[No. 12897. Department Two. January 11, 1916.]

RUSSELL & GALLAGHER, *Respondents*, v. YESLER ESTATE,
INCORPORATED, *Appellant*.¹

• ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE—CONSTRUCTION—BUILDING CONTRACTS—DECISION OF ARCHITECT—FINALITY. An architect is not the final arbiter of claims for extras through changes in the plans, or for demurrage on account of delay, under a building contract providing that he shall value and appraise any alteration required and determine the amount to be added or deducted, and that, should any dispute arise respecting the true value thereof, the same shall be arbitrated by appealing to the city superintendent of buildings, whose decision shall be final and binding, that the decision of the architect shall be final in case of disputes as to the work to be done, and providing for demurrage in case of delay "subject to the right of arbitration above mentioned"; and where the arbitrator agreed upon refuses to act, the question is one for the courts, in view of the rule favoring the right to resort to the courts where the intention is doubtful.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be set aside unless the evidence preponderates against them.

Appeal from a judgment of the superior court for King county, Humphries, J., entered December 14, 1914, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Hughes, McMicken, Dovell & Ramsey and *R. J. Venables*, for appellant.

Preston & Thorgrimson, for respondents.

PARKER, J.—This is an action to recover a balance due upon a building contract, including compensation for extra work and material. The case was tried before the court without a jury, resulting in findings and judgment in favor of the plaintiffs, from which the defendant has appealed.

In April, 1913, respondents, Russell & Gallagher, entered into a contract with appellant, Yesler Estate, Incorporated,

¹Reported in 154 Pac. 188.

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agreeing to construct a certain portion of a building about to be constructed upon one of its lots in Seattle. The provisions of the contract, so far as here necessary to notice them, are as follows:

"That the said party of the first part (respondents), for and in consideration of the payments to be made to them by the said second party as hereinafter provided, do hereby covenant, contract and agree to do and fully complete, by the tenth day of June, 1913, all of the digging, trenching, cribbing, pumping, cleaning, excavating; and build the foundation and basement walls, piers and posts for a building to be erected, on the site described in the specification, according to the plans, specifications and drawings (which are declared to be a part of this agreement), made by A. Wickersham, architect (acting as agent for said owner), in a good, substantial and workmanlike manner, to the satisfaction of and under the direction of said architect, . . .

"It is also further agreed that the said party of the second part, may make all alterations by adding, omitting, or deviating from the aforesaid plans, drawings and specifications, or either of them, which it shall deem proper and the said architect shall advise, without impairing the validity of this contract, and in all such cases the said architect shall value or appraise such alteration, and add to or deduct from the amount herein agreed to be paid to the said first party the excess or deficiency occasioned by such alteration, but should any dispute arise respecting the true value of any works added or omitted by the contractor, the same shall be arbitrated by appealing to the superintendent of buildings for the city of Seattle, who has been hereby mutually selected and whose decision shall be final and binding on all parties, each party paying one-half of the fee. It is further agreed that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be or that has been performed under it, or in relation to the plans, drawings and specifications, the decision of the said architect shall be final and binding on all parties hereto. . . .

"It is further agreed should the contractor fail to finish the work at the time agreed upon, they shall pay to or allow the owner, by way of liquidated damages, the sum of twenty dollars per diem, for each and every day thereafter the said

[No. 12900. Department Two. January 11, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v.
WALLACE KETTERMAN, *alias Jack Long*,
Appellant.¹

RECEIVING STOLEN GOODS—INFORMATION—SUFFICIENCY—"LARCENY"—STATUTES. Under Rem. & Bal. Code, § 2601, defining larceny where any person, "with intent to deprive or defraud the owner thereof," shall (1) take and drive away the property of another; or (2) shall obtain property by the aid of checks or drafts unlawfully drawn; or (3) withhold or appropriate property held in his possession as bailee, agent, etc.; or (4) withhold or appropriate property received by reason of a mistake; and (5) knowing the same to be "so appropriated" shall receive any property wrongfully appropriated, the words "so appropriated" applies to the original larceny of property specified in each and all of the preceding four sub-divisions.

SAME—INFORMATION—SUFFICIENCY. In an information for receiving stolen property, it is not necessary to allege the facts going to constitute the original unlawful taking as would be required in a prosecution therefor.

CRIMINAL LAW—TRIAL—CHALLENGE TO SUFFICIENCY OF EVIDENCE—SPECIFIC OBJECTIONS—NECESSITY. A general motion to take the case from the consideration of the jury only raises the question as to whether there is any evidence tending to prove the crime charged and is insufficient to support the specific objection that the evidence was insufficient to show the accused's connection with the crime, where there was ample evidence to show that the offense had been committed.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered April 17, 1915, upon a trial and conviction of receiving stolen goods. Affirmed.

Charles R. Hill and *O. H. Horton*, for appellant.

R. M. Burgunder and *Thomas Neill*, for respondent.

PARKER, J.—The defendant, Wallace Kettermen, was charged by information, filed in the superior court for Whitman county, with the crime of receiving stolen goods. His trial before the court and a jury resulted in verdict and

¹Reported in 154 Pac. 182.

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judgment against him, from which he has appealed to this court.

Counsel for appellant first contend that the trial court erred in overruling their demurrer to the information, which reads, in part, as follows:

"Wallace Kettermen, alias Jack Long, . . . did then and there wilfully, unlawfully and feloniously, with the intent to deprive the owner thereof, and knowing the same to have been stolen, receive at substantially the same time, from some person whose name is unknown to the prosecuting attorney, and withhold one saddle and bridle, the personal property of Ivan Marsh, of the value of \$30; one saddle, the personal property of J. H. McCroskey, of the value of \$25; and one saddle, the personal property of William Horton, of the value of \$25."

This was intended to charge the crime as defined by Rem. & Bal. Code, § 2601 (P. C. 135 § 695), which reads:

"Every person who, with intent to deprive or defraud the owner thereof—(1) Shall take, lead or drive away the property of another; or (2) Shall obtain from the owner or another the possession of or title to any property by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or (4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person

entitled thereto; and (5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act—Steals such property and shall be guilty of larceny.”

The theory of counsel's contention touching the sufficiency of the information is not made very clear to us; but it seems to be, (1) that the words “so appropriated,” in the fifth subdivision above quoted, refer only to property appropriated in the manner specified in the fourth subdivision immediately preceding; and (2) that the information is defective in that the manner of the original larceny is not charged as being that defined in the fourth subdivision. As to the first, we are of the opinion that the words “so appropriated,” in the fifth subdivision, refer to the manner of the original larceny of property specified in each and all of the preceding four subdivisions.

As to the second, it is the law that “It is not necessary to allege the facts going to constitute the original unlawful taking or embezzlement, as would be required in case of prosecution therefor.” 34 Cyc. 520. Our own decisions in *State v. Druzinman*, 34 Wash. 257, 75 Pac. 814, and *State v. Ray*, 62 Wash. 582, 114 Pac. 439, lend support to this view though not directly in point. We conclude that the information is sufficient.

It is further contended that the trial court erred in overruling the challenge to the sufficiency of the evidence to support conviction, made by counsel for appellant in their motions for directed verdict of acquittal. These motions were made at the close of the state's evidence and at the close of all the evidence. The first was simply:

“If the court please, at this time I move that the case be withdrawn from the jury and the jury instructed to return a verdict of not guilty on the evidence presented by the state.”

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The second was no more specific. Neither was argued by counsel. It is plain from the record that this is not a case of no evidence. The evidence was ample to show the commission of the crime, though not very certain as to appellant's connection therewith. This is the particular defect now for the first time urged by counsel for appellant. Answering a similar contention in *State v. Hyde*, 22 Wash. 551, 61 Pac. 719, Judge White, speaking for the court, at page 564, said:

"This motion is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. The record fails to disclose that the objection to the evidence in the particular matter, as to the kind, amount, and value of money, was called to the attention of the court, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds therefor."

See, also, *State v. Tamler*, 19 Ore. 528, 25 Pac. 71, 9 L. R. A. 853; 12 Cyc. 596. To now rule upon these motions contrary to the ruling of the trial court would, in effect, be ruling upon a question not fairly presented to that court.

The judgment is affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

[No. 13041. Department One. January 11, 1916.]

GEORGE JENSEN, *Respondent*, v. F. C. SCHLENZ *et al.*,
Appellants, THE CITY OF TACOMA *et al.*,
Respondents.¹

TRIAL—MISCONDUCT OF COUNSEL—SHOWING INDEMNITY INSURANCE. In a personal injury case, inquiry of a juror as to whether he had business dealings with any of the defendants, revealing that he was in the liability insurance business and that defendants might be insured, is not misconduct of counsel in placing such fact before the jury, where the information came about naturally in response to lawful inquiry.

TRIAL—MISCONDUCT OF COUNSEL—IMPROPER OBJECTIONS. An objection to the participation of counsel for a defendant that had been dismissed out of the case is not misconduct of counsel upon which error can be predicated, where it came about through a confusion of ideas and the parties came to a common understanding and "consented" that a judgment of nonsuit be entered.

DISMISSAL AND NONSUIT—JOINT TORT FEASOR—RIGHT OF CODEFENDANT. Consent to the dismissal of one or more joint tort feors is equivalent to a voluntary nonsuit, which cannot be objected to by co-defendants.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction affecting only the liability of a joint tort feasor dismissed out of the case by consent of the plaintiff.

TRIAL—INSTRUCTIONS — PREJUDICE — COMMENT ON FACTS. An instruction that there was no evidence to warrant a finding of fault in the construction of a manhole, is not prejudicial to defendants who were found to have negligently maintained the same; nor would it be an unlawful comment on the facts.

NEGLIGENCE — PRESUMPTIONS — CIRCUMSTANTIAL EVIDENCE. While negligence is never presumed, it may be established by circumstantial evidence; hence an instruction thereon may be warranted, although no witness testified directly as to the fact.

TRIAL—INSTRUCTIONS—AS A WHOLE. Instructions must be construed as a whole, and not isolated for the purpose of criticism.

DAMAGES—PERSONAL INJURIES—EARNING CAPACITY—INSTRUCTIONS. In an action for personal injuries, an instruction authorizing recovery

¹Reported in 154 Pac. 159.

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for "depreciation in earning capacity, if any" where plaintiff returned to work at the same wages, is not necessarily prejudicial, where the element of lessened earning capacity was not the only question in the case, the jury was not left to speculation, and there was fact to rest the verdict upon.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries, causing constant pain and weakness to a man sixty years of age, which may be permanent, will not be held excessive when not so large as to reflect passion or prejudice on the part of the jury.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 11, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by falling on a manhole. Affirmed.

A. F. Williams, for appellants.

P. V. Davis and *Gordon & Easterday*, for respondent Jensen.

T. L. Stiles and *Frank M. Carnahan*, for respondent City of Tacoma.

CHADWICK, J.—Respondent fell on a manhole and was injured. The manhole was maintained in the sidewalk for the purpose of putting fuel into the basement of a hotel which was conducted by appellants. It is alleged that the covering on the manhole was negligently maintained.

Defendants Huth, the owners of the building, were dismissed out of the case during the progress of the trial. The jury found in favor of the city of Tacoma, and rendered a verdict in favor of respondent, Jensen, in the sum of \$1,500. There was testimony to sustain the finding of the jury that the cover to the manhole was negligently maintained, and a motion for nonsuit was properly overruled.

Upon the examination of one of the jurors and in answer to the question: "Your business is what?," he answered, "I am with L. N. Hanson Company, liability insurance and surety bonds." He was then interrogated further:

"Q. Do you carry insurance on the Carlton Hotel? A. No. Q. Do you know Mr. Schlenz? A. That is in a business way. Q. That is you have done business with them? A. I think possibly. Q. Do you know what branch of your line of business which you have done for these different people, any of it indemnity? A. I think that for the Pacific Brewing & Malting Company we might have written some. Q. Any kind with the Schlenzes and Huths? A. Oh, I could not recall. I think possibly it was liability and such as that. Q. Ever hear of this case? A. I don't just recall as I have. I generally keep in touch with all these personal injury cases because that is my line, but I don't just recall the case now. Q. It is a part of your business, regular business to keep in touch with them? A. Yes. Q. And ascertain to what extent if at all your company is interested? A. Yes. Q. You don't recall whether you ever had occasion to look into this or not? A. No. Q. You don't know now whether your company is interested in the result of the suit? A. I don't think so. No. I am pretty sure it is not. Q. It may be and it has escaped your attention? A. I think possibly this would be in our general liability insurance policy. I think another company, that is— Q. You think you are not interested in that way in this case? A. No. Q. Well, we will pass you."

Counsel predicates error upon this incident, saying:

"This court has held in many instances that any attempt on the part of counsel to bring before a jury the question of insurance in a case of this character is reversible error."

We do not understand that the court has ever gone so far. The extent of our holding is that if it be apparent that counsel deliberately sets about, although in an indirect way, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial.

"In cases of this kind if it should appear that the purpose of the examination was to inform the jury that the burden of a judgment, if obtained, would fall upon an insurance company instead of the defendant, we would hold it such misconduct on the part of the attorney as would warrant a reversal." *Hoyt v. Independent Asphalt Pav. Co.*, 52 Wash. 672, 101 Pac. 367.

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Counsel had a right to inquire into the business of the juror and to know whether he had any business dealings with any of the defendants, although the examination might reveal the ultimate fact that the defendant was insured. If such information comes about naturally and is an incident to a lawful inquiry, there can be no error. If it is injected in a collateral way, it is held to be harmful. The gravamen of the offense is not in the disclosure of a collateral fact, but in the manner of its disclosure, that is, the misconduct of counsel. The cases to sustain our holding are collected in *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99.

It is objected that counsel for respondent was guilty of misconduct, in that he objected to the further participation in the trial of the attorney for the defendants Huth after they had been dismissed out of the case. A motion for a nonsuit had been made on behalf of the Huths which was not "resisted." There followed a confusion of ideas and the court finally denied the motion. Counsel for respondent evidently proceeded upon the theory that the Huths were out of the case, and other counsel that they were still in. Hence the objection to their further participation. When the objection was made, all parties seem to have come to a common understanding, and counsel for respondent "consented" that a judgment of nonsuit be entered. We can find no prejudice in the proceeding.

Nor was it error to dismiss the defendants Huth. The consent that a judgment of nonsuit might be entered was equivalent to a voluntary dismissal. 14 Cyc. 411. Any one or more joint tort feasons may be dismissed out of a case if the plaintiff consents thereto or takes no exceptions to an order of dismissal. It is not a matter of legal concern to his codefendants. *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406; *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311; *Groot v. Oregon Short Line R. Co.*, 34 Utah 152, 96 Pac. 1019.

Error is predicated upon an instruction in which the court told the jury that there was no evidence to warrant a finding of fault in the construction of the manhole or

“ . . . any danger to pedestrians walking over the same if the covering over the manhole was inserted in the opening and was maintained by the persons in charge of the Carlton Hotel, in the way that it was designed to be maintained, and rubbish or debris were not permitted to lodge or accumulate in the space intended for the covering, and Huth and wife have been dismissed from the action. This leaves for your determination the question, whether or not the defendants city of Tacoma, or F. C. Schlenz and wife, or either or both of them, were guilty of negligence charged against them by the plaintiff in this action.”

The instruction was wholly unnecessary, inasmuch as the Huths had taken a judgment of nonsuit, but we cannot see wherein it prejudiced respondents. Neither is it objectionable as a comment upon the facts. Granting that no witness did swear directly that sticks and bark and rubbish had been permitted to accumulate in the collar of the lid of the manhole, there is evidence from which the jury could have inferred the fact. Negligence, while never presumed, may nevertheless be proved, like any other fact, by circumstantial evidence. *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054; *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313.

The court told the jury:

“I instruct you that you are not at liberty to conclude that the walk in question at the time and place of the accident, was in a dangerous condition simply because of the accident which happened to plaintiff. But you must consider all the facts and circumstances with relation to the condition of the walk at the time of the accident, and from all of the facts and circumstances in the case, as shown by the evidence and under the instructions I give you as to the law, determine in your own mind whether the place where plaintiff was in-

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jured was in a dangerous condition to persons traveling in the ordinary way, using ordinary care."

It is said:

"Under this instruction the jury would be justified in returning a verdict against the appellants regardless of whether any act of negligence had been established against them or not. The court in effect directs the jury that if they find that the sidewalk at the place and time where the plaintiff was injured was in a dangerous condition they must find a verdict for the plaintiff. No mention is made of this dangerous condition being caused by the negligence of appellants. The only question for the jury to determine was whether or not the sidewalk was in a dangerous condition."

We have often held that an instruction will not be isolated for the purpose of criticising it, but that we will keep it in its setting and construe it with reference to, and in relation to, the other instructions given to the jury. We will not now stop to assemble the cases. We have read the instructions and find that the court instructed fully upon the law of negligence, and that respondent could not recover unless the jury found that appellants were in fact negligent.

It is complained that the jury were instructed that it might allow respondent a recovery for "depreciation in his earning capacity, if any," and all loss and damages "for inability to follow his usual occupation," whereas there was no testimony to show depreciation in earning capacity or inability to follow his usual occupation. It appears that respondent returned to his work in about six weeks, receiving the same wages he had received before the accident. We must credit jurymen with having the common understanding of men, and when told that they may allow for a particular damage, if any, that they will not accept that statement as a fact and predicate a recovery upon it unless there is testimony to sustain it. It is not every misstatement or unnecessary statement of the law that will be held to be prejudicial. It is only so held when the misstatement or unnecessary statement can

be fairly held to be a misdirection of such consequence as to raise a presumption of prejudice. If the element of lessened earning capacity was the only question in the case the instruction would have been erroneous, but it was not. The jury was not put to the stress of speculation. There was fact to rest the verdict upon and law to sustain it.

The other objection is without merit. Respondent had, for a time at least, been unable to pursue his usual vocation. We cannot presume that the jury went beyond the evidence.

Neither can we say, as a matter of law, that the verdict is so large that it reflects the prejudice or the passion of the jury. Respondent suffered a painful injury. He testified that he was in constant pain; that his work kept him upon his feet all the time; that the injury had brought on a varicose condition of the veins in his leg, and that he was weak and became quickly exhausted. Respondent was sixty years of age at the time the accident occurred, and there is medical testimony to the effect that his injuries are permanent and will not grow less in degree. We find no prejudicial error.

Affirmed.

MORRIS, C. J., ELLIS, MOUNT, and FULLERTON, JJ., concur.

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[No. 12559. Department Two. January 12, 1916.]

S. K. PAINTER *et al.*, *Plaintiffs and Respondents*, v. E. J. KENNEDY *et al.*, *Cross-Complainants and Respondents*, J. A. MACAULEY *et al.*, *Defendants and Respondents*, GRANT COUNTY BANK, *Defendant and Appellant*.¹

MORTGAGES—ASSUMPTION OF MORTGAGE—DEED TO AGENT—EFFECT—MERGER BY DEED. Where mortgaged premises were traded by the mortgagors to one who assumed payment of the mortgage, and deeded to a bank as an agent, the bank is not liable on the assumption of the mortgage from the fact that the deed was taken in its name, where it did not agree to assume the mortgage; since such a promise is not merged in the deed, but is independent of it.

TRIAL—OPENING CASE—NEW ISSUES—CROSS-COMPLAINT—DILIGENCE—DISCRETION OF COURT—JUDGMENT—RES JUDICATA. It is not an abuse of discretion in a mortgage foreclosure suit, for the trial court, after trial and announcement of the judgment, to refuse leave to a defendant to file a cross-complaint against a codefendant for the purpose of establishing a liability for the amount of a deficiency judgment upon an alleged assumption of the mortgage; since there was lack of diligence, and the foreclosure decree does not prejudice the right to establish the liability in an independent action.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered August 27, 1914, upon findings in favor of the plaintiffs, in an action to foreclose a mortgage, tried to the court. Reversed as to the appeal of Grant County Bank; affirmed as to the appeal of Bell.

John Sandidge, for appellant Bell.

William M. Clapp and *Earl W. Husted* (*Troy & Sturdevant*, of counsel), for appellant Grant County Bank.

Herr, Bayley & Wilson and *Carl E. Croson*, for respondents Kennedy *et al.*

FULLERTON, J.—On November 27, 1911, the defendants Kennedy and wife borrowed from the respondent S. K. Paint-

¹Reported in 154 Pac. 161.

er the sum of \$1,500, securing the same by mortgage on certain real property situated in Snohomish county. Subsequently, Kennedy and wife mortgaged the premises to other parties to secure their several obligations, the total face value of all of the mortgages aggregating, on December 28, 1912, some \$4,335. On the day last mentioned, Kennedy and wife exchanged the property for certain property of one E. C. Davis situated in Grant county. Davis was then president of the appellant Grant County Bank, and the deed from Kennedy and wife of the Snohomish county property was made to the bank. There was also a mortgage on the Grant county property, and the deeds as exchanged severally recited that it was made subject to the incumbrances on the property therein described. There was no recital in either deed that the grantee therein assumed the incumbrances.

On January 5, 1914, the respondent Painter, his wife joining therein, brought the present action to foreclose the mortgage executed to him by Kennedy and wife. In his complaint, he made parties defendant the original mortgagees, the subsequent lien holders, and the Grant County Bank. In the complaint as originally filed, he asked for a deficiency judgment against all of the defendants, but subsequently filed a supplemental pleading disclaiming a right to a deficiency judgment against any of the defendants other than the mortgagors. The bank thereupon made no answer to the complaint.

On February 20, 1914, the defendants Kennedy and wife filed a cross-complaint in the action, in which they alleged that the bank, in consideration of the exchange of the properties before mentioned, assumed and agreed to pay all of the incumbrances on the Snohomish county property existing at the time of such transfer, and thereby became liable to the original and cross-complainants for the payment of the original indebtedness, and consequently liable to the cross-complainants for any deficiency which might be chargeable after the foreclosure sale. The cross-complaint was served on the

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bank, and it made answer thereto by a general denial, and by an affirmative plea to the effect that the actual purchaser of the property was one E. J. Duffey, and that it took the legal title to the property as security for certain notes executed and delivered to it by Duffey, and for no other purpose.

On the issues framed between Kennedy and the bank, a trial was had, resulting in findings to the effect that the bank had assumed and agreed to pay the incumbrances on the property conveyed to it, and in a decree to the effect that the plaintiffs recover over against the bank for any deficiency that may remain after the sale of the mortgaged property. From this decree, the Grant County Bank appeals.

After the trial of the issues between the defendants Kennedy and the Grant County Bank had been concluded, and after the court had announced its judgment therein, one Ralph C. Bell, as trustee, who was made defendant in the original action, filed an answer and cross-complaint, serving it upon Kennedy and wife and the Grant County Bank with an original summons, seeking a foreclosure of certain of the junior mortgages and a sale of the property thereunder. A deficiency judgment was also sought against the bank for any deficiency that should remain after the sale of the mortgaged premises and the application of the proceeds of the sale properly applicable thereto in payment of the amount due on the junior mortgages. The bank moved to strike this complaint as coming too late, which motion the trial court granted. Bell appeals from the order evidencing the ruling of the court upon the motion.

Noticing first the appeal of the Grant County Bank, we are unable to find anything in the record upon which the judgment against it can rest. It was testified by both Davis and Kennedy that the property in Grant county, given in exchange for the property conveyed to the bank, was the property of Davis, and that all of the negotiations leading up to the exchange were had between Davis and Kennedy and their representatives. Davis denied that a promise to

assume the incumbrances was made by any person. Kennedy testified that the promise was made by Davis, but even he does not say that Davis made the promise for or as the representative of the bank. In fact, nowhere in the record, in so far as we can discover, was the bank's name mentioned in the transaction until all of the negotiations were concluded and nothing remained to be done but execute and deliver the deeds. If the fact be that Davis promised to assume the incumbrances and then caused the deed to run in the name of the bank, it would not of itself create a liability on the part of the bank to redeem the promise. Such a promise does not become merged in the deed and thereby bind the person to whom it is executed. Indeed, it is only on the principle that such a promise "is not merged in the deed, and is not contradictory but independent of it," that it can be enforced at all. *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892. The bank can be held only in the case that it promised to pay the incumbrances. It stands, therefore, in so far as the record discloses, precisely in the position it would have stood had the property been originally conveyed to Davis and by Davis subsequently conveyed to it. We conclude, therefore, that the court was in error in entering a deficiency judgment against the Grant County Bank.

On the appeal of the defendant Bell, we do not feel inclined to disturb the order of the court. Whether the court would permit the defendant at that late day to come into the case was a matter largely within its discretion, and this court is not authorized to disturb its order unless it plainly appears that there was an abuse of such discretion. We cannot so find. While it is true no formal default had been entered against the defendant, yet he was so far negligent that to grant his request would compel the court to try the action anew. Moreover, the answer and cross-complaint discloses that its chief purpose is to charge the Grant County Bank with the payment of the mortgages. If the bank is liable for their payment, recovery can be had in an independ-

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ent action. The order is not *res judicata* of any right the appellant may have in that respect.

The judgment is reversed on the appeal of the Grant County Bank, and the cause remanded with instructions to so modify it as to relieve the bank from any personal liability for the obligations mentioned in the plaintiffs' complaint. On the appeal of Bell, it is affirmed.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 12692. Department Two. January 15, 1916.]

GEORGE C. DUFUR, *Appellant*, v. LEWIS RIVER BOOM &
LOGGING COMPANY, *Respondent*.¹

LOGS AND LOGGING — BOOMING COMPANY — LIABILITY FOR LOSS — STATUTES. A booming and driving company is not obligated to catch and boom all the logs that may be driven down a stream, under the statute, either prior to its amendment in 1909, when booming and driving companies were (by Laws 1889-90, p. 470, as amended by Laws 1895, p. 128 and Laws 1905, pp. 108 and 232) only required to boom logs which the owner requested to be caught or logs which came down not in charge of the owner, regardless of the original navigability of the stream; nor after its amendment, when by Rem. & Bal. Code, § 7123, tolls were authorized by a driving and booming company, operating on a stream that was theretofore navigable, for all logs which it drives or booms at the request of the owner, or without such request when commingled with other logs or which obstructed the drive, and also upon logs which are driven or floated down a stream which was not navigable prior to the company's improvement of the stream.

SAME—BOOMING COMPANY—ACTION FOR LOSS OF LOGS—PLEADING—COMPLAINT—SUFFICIENCY—LEGAL CONCLUSION. A complaint against a booming and driving company for the loss of logs floated down the stream must allege facts to show that the plaintiff's logs reached the defendant's boom in some of the ways which, under the statute, imposed the duty to catch and boom them, since the company is not obligated to boom all logs that may be driven; and where the complaint is silent as to the facts, the mere allegation that "it became the duty of defendant to catch and hold" the logs is a mere conclusion of law and insufficient to state a cause of action.

¹Reported in 154 Pac. 463.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered November 10, 1914, upon sustaining a demurrer to the complaint, dismissing an action for damages. Affirmed.

B. L. Hubbell, for appellant.

Miller & Wilkinson, for respondent.

FULLERTON, J.—The appellant brought this action against respondent, stating his cause as follows:

“(1) That the defendant is now, and was at all times hereinafter alleged and mentioned, a corporation doing business under and by virtue of the laws of the state of Washington, and was at said times a public service corporation organized for the purpose of driving, sacking, sorting, rafting and booming logs and other timber products, and was engaged in operating a boom at the mouth of the Lewis river in the county of Cowlitz and state of Washington at the confluence of said Lewis river with the Columbia river.

“(2) That during the times herein mentioned, the Kalama Lumber, Log and Timber Company was a corporation organized and doing business under and by virtue of the laws of the state of Washington, and engaged in lumbering in Cowlitz county, Washington.

“(3) That between the 1st day of September, 1907, and the 23d day of February, 1912, the said Kalama, Lumber, Log and Timber Company placed in the Lewis river and floated to the rafting and booming grounds of defendant at the mouth of the said Lewis river, 3,855,454 feet of logs.

“(4) That it became and was the duty of defendant to catch and hold, assort and raft said logs, and to account therefor to the owners thereof; that defendant rafted and accounted for 2,223,068 feet of said logs so floated to said rafting grounds by the said Kalama Lumber, Log & Timber Company.

“(5) That of said 3,855,454 feet of logs so floated to the rafting and booming grounds of defendant, said defendant failed to catch and hold, assort, boom and raft 1,632,386 feet, and has utterly failed to account therefor, though demand has been made therefor; that said logs were of the value of \$9 per thousand feet, and plaintiff is damaged by

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defendant's failure to so catch and hold, assort, boom and raft said 1,632,386 feet, in the sum of \$14,688.61.

"(6) That plaintiff has no knowledge or belief as to what disposition was made of said logs by defendant, and is unable to allege whether said logs were converted by defendant or lost; that plaintiff has been informed and believes that defendant failed to catch and hold a portion thereof, and allowed a portion thereof to escape from its booms, but plaintiff is not informed as to what amount defendant failed to catch and hold, and what amount was allowed to escape from defendant's booms, and is unable to allege said amounts; that defendant has informed plaintiff that it has none of said logs in its possession.

"(7) That heretofore, to wit, on the 4th day of January, 1912, the said Kalama Lumber, Log and Timber Company duly assigned the said claim and cause of action against defendant to plaintiff herein."

To the complaint, the respondent interposed a demurrer on the grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; and (2) that the action was not commenced within the time limited by law. At the hearing had upon the demurrer, the trial court sustained the same; entering a general order to that effect without specifying upon which of the grounds stated in the demurrer the order was rested, and granting to the appellant ten days within which to amend his complaint. Thereafter the appellant gave notice that he refused to plead further, and that he elected to stand upon the complaint, whereupon the court entered a judgment against him, dismissing his action with costs. This appeal is from the judgment so entered.

The action, it will be observed, is founded upon the so-called booming and driving statutes of the state. The statute of 1889-90 provides for the organization of corporations for the purposes of catching, booming, sorting, rafting and holding logs and other timber products, and empowers such corporations, when so organized, to go upon any of the "waters of the state or the dividing waters thereof" and to construct and maintain the necessary booms and other works

for the purposes mentioned. It further provides that, when such works are constructed, the corporation shall catch, boom, sort, raft and hold the logs and timber products of all persons requesting such service, and, when the works are erected at the mouth of any river, the logs and timber products which shall come to the works not in charge of the owner, without such request; reasonable tolls being provided for the services. (Laws of 1889-90, p. 470.)

In 1895 (Laws of 1895, p. 128), the legislature provided for the organization and incorporation of companies for the purpose of clearing out and improving rivers and streams and for driving logs and other timber products thereon. The act empowered any such corporation to enter upon any of the rivers and streams of the state or the dividing waters thereof and remove jams, roots, snags and rocks therefrom, straighten the channel of such streams, build wing dams and sheer booms thereon, and construct dams with gates for storing water with which to create artificial freshets therein. It made it the duty of such corporations, after the construction of such works, to sluice, sack and drive all logs and timber products which the owner should request to be so sluiced, sacked and driven, and all logs and timber products without such request which lay in such position as to obstruct or impede a drive; empowering it to charge tolls for such service not exceeding a certain maximum. The act also provided that boom companies theretofore incorporated might also become driving corporations by filing amended articles of incorporation embodying the provisions of the act; each of these acts providing that any corporation acting under and in accordance with their provisions should be liable to the owner of logs or timber products for all loss or damage resulting from neglect, carelessness or unnecessary delay on the part of such corporations.

The act of 1895 was twice amended by the legislature in 1905. Laws of 1905, pp. 108 and 232. In the one act, the provisions of the corporation were somewhat more definitely

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defined and limited; and in the other, it was empowered to operate upon streams tributary to the stream on which its original works were constructed. It was again amended by the legislature of 1909 (Laws of 1909, p. 816; Rem. & Bal. Code, § 7123; P. C. 405 § 175). It is there provided that, when such a corporation comes upon a stream which was theretofore navigable, it may exact tolls for all logs and timber products which it drives at the request of the owner, or which it drives without such request when commingled with other logs, or lay in such a position as to obstruct or impede a drive; and also upon all logs and timber products which are driven or floated down a stream which was not theretofore navigable but which is made so by the act of the corporation in driving out the obstructions originally therein. It is further provided that, if such driving corporation is also a booming corporation, and maintains booms upon the stream, it may exact booming charges for all logs and timber products for which it is permitted to exact driving charges.

From the foregoing epitome of the several legislative enactments, it is clear that the statute does not impose upon a booming corporation the duty of catching and booming all logs that may be driven or which may float down the river on which its booming works are constructed. Prior to the amendment of 1909, its duty and right in that respect was limited to logs which the owner requested to be so caught and boomed, or logs which came down the stream not in charge of the owner, regardless of the nature of the stream; that is, whether the stream was by nature capable of floating logs, or whether it had been made so by the acts of the corporation. Nor, after that amendment, did it owe the duty to catch and boom all logs coming to its works in rivers navigable prior to the time it entered upon the river. As to rivers made navigable by the corporation acting as both a booming and driving company, it may owe that duty, since it is empowered to collect both driving and booming tolls on all logs driven or floated down such a stream, whether by

the company itself or whether with or without the aid of some other person. A complaint, to state a cause of action for a breach of duty on the part of either of the corporations permitted to be organized by the statutes, must allege facts sufficient to show that the duty arose; that is to say, that the logs reached the boom of the company in some one of the ways which, under the terms of the statute, gave rise to a duty on the part of the company to catch and boom the logs, and that the company failed and neglected to perform that duty.

Turning to the complaint, we find it alleged that the respondent is a booming and driving company operating a boom at the mouth of the Lewis river; that, between certain dates, the appellant's assignor placed in the river, and floated to the boom of the respondent, a certain quantity of logs; "that it became the duty of defendant to catch and hold, assort and raft said logs," and to account therefor to the appellant's assignor; and that it failed in the performance of that duty. No fact is alleged showing that the duty to boom the logs arose from the operation of the statute. It is not alleged that the owner of the logs requested the respondent to boom them; it is not alleged that the logs came to the boom of the respondent not in charge of their owner; it is not alleged that Lewis river is a stream not capable of floating logs by nature, and that the respondent had made it so floatable. Nor is it alleged that the logs were delivered to the respondent, or that the owner of the logs and the respondent had entered into a contract by which the respondent was obligated to catch and boom the logs. The only allegation which seeks to charge the respondent with a duty is the one above quoted. But this is not an allegation of fact. It is but the conclusion the court would draw from the pleadings were some fact alleged showing that the duty arose. In other words, it is a conclusion of law, not an allegation of fact upon which the other party may take issue.

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The appellant cites and relies upon the case of *Chesley v. Mississippi & Rum River Boom Co.*, 39 Minn. 83, 38 N. W. 769, but we cannot think the case in point on the question here presented. In the part of the opinion specially relied upon, the court was discussing the question of the burden of proof. The trial court charged the jury that, if the logs were delivered to the defendant, and not received back again, there was a *prima facie* case of negligence until the receiver of the logs showed that it was not negligent. The court held the charge to be without error. But here there is neither an allegation of delivery nor the allegation of any fact from which delivery can be inferred. Had there been such an allegation, the case would be in point on the question whether the other allegations in the complaint charged a neglect of duty on the part of the respondent; but, as we have attempted to show, the primary question before us is not that, but is, rather, does the complaint show that the respondent owed the appellant the duty of catching and holding the logs?

Our conclusion is that the complaint fails to state a cause of action, and that the judgment must be affirmed upon the first ground stated in the demurrer. This renders it unnecessary to discuss the second. The judgment is affirmed.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 12748. Department Two. January 15, 1916.]

FRANK M. JARVIS *et al.*, *Appellants*, v. THOMAS A. IRELAND
et al., *Respondents*.¹

FRAUD—PROOF—PRESUMPTIONS. Fraud, as ground for the rescission of a contract, will not be presumed or conjectured.

EXCHANGE OF PROPERTY — FRAUD — EVIDENCE — SUFFICIENCY. A charge of fraud in the exchange of property, in misrepresenting the price paid for and the value of shares of the capital stock of a land company, rescission of which is sought, is fully met and becomes immaterial where it is shown that the defendant refused *bona fide* offers for the stock equal to the represented value.

LIMITATION OF ACTIONS—FRAUD—DISCOVERY—EXCHANGE OF PROPERTY—RESCISSION—LACHES. Where plaintiffs, seeking rescission of the sale to them of shares of the capital stock of a land company, on account of misrepresentations as to its value and the amount of offers received for it, did not commence action until more than three years after discovery of the fraud, the action is barred, both by the statute of limitations and equitable estoppel.

EXCHANGE OF PROPERTY—RESCISSION—FRAUD—LACHES — EVIDENCE — SUFFICIENCY. The rescission of an exchange of property for shares of the capital stock of a land company, for defendant's fraudulent representations as to the character and value of the company's land, located at a great distance and which could not be examined, is properly denied, where the preponderance of the evidence is to the effect that the plaintiff knew defendant had no personal knowledge of the land, that his statements were made honestly and not positively, but upon reports received from others, to whom the plaintiff was referred, and that plaintiff did not rely thereon but interviewed the other parties, officers, and stockholders, between whom and defendant there was no collusion, and acted upon information received from others rather than defendant's representations; especially where, as a director in the company, plaintiff took no steps to complete purchase of the company's lands or to rescind the contract for a long time, meanwhile refusing an offer for the company's options that would have netted him a profit, until such time as the secretary of the company absconded and embezzled the funds of the company, making the stock worth less than it would otherwise have been.

Appeal from a judgment of the superior court for Whitman county, Mills, J., entered November 16, 1914, in favor

¹Reported in 154 Pac. 455.

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of the defendants, dismissing an action for rescission, tried to the court. Affirmed.

S. P. Domer and Skuse & Morrill, for appellants.

Neill & Burgunder, for respondents.

HOLCOMB, J.—Appellants sued to rescind a contract and sale entered into between the husband and respondent Thomas A. Ireland, on October 25, 1910.

Under the contract, appellants conveyed a certain lot and a brick block thereon in Chewelah, Washington, and respondents, in payment therefor, transferred to appellants 5,000 shares of common stock of the Skeena Valley Land Company, paid \$250 in cash, and assumed a mortgage of \$1,100 on the Chewelah real estate. The grounds for rescission are alleged false and fraudulent representations made by respondent Thomas A. Ireland for the purpose of inducing appellants to enter into the contract and sale, and which were so relied upon.

The representations of fraud are these:

(1) Statements of fact made by respondent Thomas A. Ireland to appellant Frank M. Jarvis concerning the price paid by respondent for the common stock of the Skeena Valley Land Company transferred to appellants, and of cash offers made to respondent for the purchase thereof then pending.

(2) That the Skeena Valley Land Company was then and there the owner of approximately 10,000 acres of land in the Skeena river valley, British Columbia, adjacent to the town of Hazelton.

(3) That such lands were first-class, level, agricultural lands, susceptible of cultivation and adapted to the raising of good crops of grain and fruit.

(4) That the 5,000 shares of stock entitled the holder thereof to select from the lands above mentioned and have conveyed to the holder of such stock 517 acres of first-class,

level, agricultural land in the Skeena river valley, which were similar to adjoining lands then selling for \$50 per acre.

It is further alleged that the lands were over 1,000 miles from where the contract was made and could not be examined by appellants, and they had no means of ascertaining the truth or falsity of the statements and representations made by respondent, but relied upon the statements so made.

The trial court found for the respondents chiefly upon the grounds of the laches of appellants, based upon the incontrovertible facts disclosed that appellants discovered, if it were true, as early as November 23, 1910, that respondent's representation as to cash offers for his stock was false, and that, therefore, the statute of limitations operated as a legal bar to that ground of rescission; that appellants knew, as early as the early part of 1912, that the land company did not own the land represented, but did not then take any steps to rescind; that, at that time, the land company had a large sum of money that could have been used in completing the acquisition from the British Columbia government of the lands for which the company had purchased options; that afterwards the secretary and treasurer of the land company, one Callahan, embezzled the funds of the company and absconded, after which occurrence appellants took steps to rescind. Whether or not the grounds of the court's decision were correct or sufficient, we must now try the cause *de novo* upon the facts and the law. It is a well established principle, here and elsewhere, that fraud must not be presumed nor conjectured. *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251; *Pierce v. Seattle Elec. Co.*, 78 Wash. 167, 138 Pac. 666.

I. As to the first charge of misrepresentation, on November 23, 1910, Jarvis wrote a letter to Ireland stating, among other things, that one Mahoney, one of the men respondent had referred to as having been willing to buy his stock for about \$7,300, had denied it to Jarvis, and that Ireland had

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placed a value of \$7,000 on the stock, and that he did not feel right about it. At the trial, Mahoney denied that he had made any such statement to Jarvis, and further stated that, in October, 1910, he would have paid Ireland \$1.50 per share for his stock, and that he then owned 20,333 shares of the stock. Another witness, one Cornelius, testified in behalf of respondent that he did in fact, about October 1, 1910, offer \$1.50 per share to respondent for his stock, but that respondent wanted two dollars per share. Whatever price Ireland may have represented that he paid for his stock became immaterial when it was shown that he could in good faith have sold it for the sum he represented he could have sold it for.

This testimony fully disproves the first charge of misrepresentation; but if it did not, its discovery in November, 1910, and nonaction by appellant until February, 1914, when this action was commenced, fully bars any action upon that discovery of fraud, by the legal limitations as well as by equitable laches. It is conceded that the rule is that fraud may consist of the vendor representing as true that which he did not know to be true and which was not in fact true; but if the vendor represented to the vendee that he had no personal knowledge of the facts, but asserted them upon information received from other parties, he would not be liable for any false representations. *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121; *Davidson v. Jordan*, 47 Cal. 351.

II. The most important particularization of fraud is that concerning the location, quality, and value of the Skeena river valley lands, for they were very remote from the location of the parties and it would be assumed that the vendee had no opportunity then to investigate them, and might rely upon the express representations of the vendor. This false inducement, if made, was the most material, and includes the second and part, at least, of the third and fourth charges of misrepresentation and fraud. We, therefore, examine the

record carefully for the purpose of ascertaining what those representations, if any, were.

The case presented is somewhat similar to that of *Romaine v. Excelsior Carbide & Gas Machine Co.*, 54 Wash. 41, 103 Pac. 32. We are not disposed to say that the elements of laches exist as completely in this case as in that. Possibly the rights of no "other people" became involved in this case, except the rights of other and subsequent purchasers of stock in the company, which appellant aided in controlling after he became a shareholder. Approximately the same time elapsed after Jarvis discovered, or should have discovered, the alleged worthlessness of the company, as in the *Romaine* case.

Every case for rescission of a contract for actionable fraud depends largely upon the particular facts of the case. In this case, we cannot escape the conclusion that the facts, and the logical inferences deducible therefrom, greatly preponderate in favor of respondents.

As to the representations themselves, the evidence for respondents outweighs that for appellants. After reading the entire evidence carefully, it convinces us that Ireland's representations were not positively made, nor with intentional deceit. We find nothing tending to show that he knew them to be false, or that he did not honestly believe them to be true, or that he had reason to doubt or disbelieve the sources of his information. Ireland was not a promoter of the enterprise. On Jarvis' own showing, it is plain that Ireland had never been, or professed to have been, on the land, and therefore had no personal knowledge of it save its very general location, but made his statements upon reports received from others, of which Jarvis well knew. By his own showing, also, Jarvis telephoned to Callahan, the secretary, general manager and chief promoter of the company, to come out from Spokane, where he had his place of business, to Hillyard, a suburb, where Jarvis lived, and talked the company's assets and prospects over very fully, and said he believed the state-

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ments made by Callahan. He also went to see and consulted with a Mr. Crane, to whom Ireland referred him, twice, and with Mr. Beck, Mr. Finley and Mr. Ratcliffe, other stockholders, before he closed the transaction with Ireland. All this fully corroborates Ireland's testimony and that of his witness Chapman, that Ireland told Jarvis that he had not seen the land of the company and knew nothing about it (except the general character and climate of the country) other than what Callahan had told him and Crane reported in writing to the stockholders, and to go see them and the other stockholders mentioned. Hence, it is obvious that Jarvis, so far from believing and relying upon the representations of Ireland as to the value of the stock and assets of the company, did not do so, but interviewed other parties, between whom and Ireland not the slightest collusion is shown, to ascertain what value they placed upon the stock of the company and its holdings; and, so far as he made his purchase upon a belief in the existence of certain facts, he acted upon the information he got from others rather than any he got from Ireland, before he would enter into the transaction. Under such circumstances, the vendor is not liable for actionable fraud and deceit. *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441.

In addition to the above circumstances, it is clear, as stated by the trial judge, that Jarvis knew, in the latter part of 1911, or early part of 1912, by reason of his being a director of the company, that the company had only options to purchase the land which it was supposed to own; he also knew that payments of cash of considerable amount, and notes to a larger amount, had been taken by this corporation for subscriptions to its capital stock, and that it was the intention of the company that the funds thus raised, and to be raised, were to be used in completing the purchase of the lands, yet he took absolutely no steps, as director, to see that these

funds were so applied; and took no steps to rescind the contract with respondent at that time nor for a long time thereafter. Long prior to the commencement of this action, he attended a stockholders' meeting at which the question was considered whether an offer for the options of the company should be accepted at a price which would have netted him at that time considerably more than he had considered the stock worth when he made the trade, and at that time he voted to refuse to make such sale, evidently relying upon the assets that were from time to time in the hands of the corporation being applied by the officers towards the acquisition of the title to the lands, until such time as the secretary and general manager had absconded and embezzled the funds of the company, and thus made his stock worth considerably less than it would otherwise have been, when he brought this action.

The foregoing reasoning and deductions of the trial judge are correct.

Appellants should not recover.

Judgment affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

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Syllabus.

[No. 12761. Department Two. January 15, 1916.]

UNITED IRON WORKS, *Respondent*, v. E. WAGNER, *Appellant*.¹

CONTRACTS—PERFORMANCE OR BREACH—FURNISHING PLANS—QUESTION FOR JURY. A contract for installing an irrigating pumping plant providing that the defendant should build the foundations after plans furnished by the defendant, requires intelligible and workable plans, and it is error for the court to decide, as a matter of law, that plaintiff was excused from strict performance by defendant's failure to build the foundations, where there was evidence that the only plan furnished was a mere pencil drawing or sketch not drawn to scale, and from which the defendant, though a carpenter and bridge builder of experience, could not complete the foundation without additional information.

CONTRACTS—SUBSTANTIAL PERFORMANCE — RECOVERY — REDUCTION. In an action for the contract price of installing an irrigating pumping plant, full performance of which was alleged to have been prevented by defendant's failure to build the foundations, it is error to allow recovery for the entire amount of the contract; since, where deviations are made from full performance, not wilfully or in bad faith, the recovery is reduced by the damages caused by such deviations, which is usually the expense of completing the contract.

SAME—SUBSTANTIAL PERFORMANCE—QUESTION FOR JURY. In such a case, it is error to take the case from the jury, where there was a conflict in the evidence as to whether plaintiff's failure to complete the installation was wilful or in bad faith, and as to whether the defendant was at fault in failing to build the foundation.

CONTRACTS — PERFORMANCE OR BREACH — DELIVERY — EVIDENCE—QUESTION FOR JURY. In an action to recover for installing an irrigation pumping plant on defendant's ranch, which provided for delivery of the machinery "on your ground," whether there was a substantial delivery is a question for the jury, where heavy machinery, the frame alone weighing 2,785 pounds, was landed from a boat on a gravel bar, near defendant's ranch, the well where it was to be installed being two hundred and fifty or three hundred feet distant up a very steep and rocky bank, and defendant could not move the machinery up to the well without risk of injuring it, and also without being considered as having accepted such delivery.

SAME—SUBSTANTIAL PERFORMANCE—WAIVER — QUESTION FOR JURY. In such a case, it is also a question for the jury whether defendant waived strict performance of the contract, where the machinery was never moved from the bar by either party, and there was testimony

¹Reported in 154 Pac. 460.

to the effect that defendant at numerous times requested to know when plaintiff would complete its installation, and did not consider that the machinery had been delivered to him according to the terms of the contract.

CONTRACTS—PERFORMANCE OR BREACH—REASONABLE TIME—PAROL EVIDENCE—ADMISSIBILITY—QUESTION FOR JURY. Where a written contract for the installation of an irrigating pumping plant specified no time for completing the work, the law implies that it shall be within a reasonable time; and while testimony that a particular time was orally agreed upon so as to permit irrigating that season is inadmissible as varying the terms of the writing, the question as to what would be a reasonable time under all the circumstances and within the contemplation of the parties is one for the jury, upon competent evidence.

Appeal from a judgment of the superior court for Chelan county, Pendergast, J., entered September 24, 1914, in favor of the plaintiff, upon withdrawing the case from the jury, in an action on contract. Reversed.

W. O. Parr, for appellant.

B. B. Adams and Williams & Corbin, for respondent.

HOLCOMB, J.—Respondent contracted in writing, on April 20, 1910, for the furnishing and installation by it of a pumping plant on appellant's ranch on the Columbia river, some eighteen miles north of Wenatchee and near Orondo. The time when the installation should be completed is not fixed by the contract. The contract is in the form of a letter or proposal and an acceptance thereof by appellant. A long list of articles of machinery, apparatus, and appliances is set forth in the contract to constitute the pumping plant, and the contract contains the following provisions:

"All agreements are contingent upon strikes, accidents or other causes beyond our control. All orders and contracts are taken subject to approval of the main office and quotations are for immediate acceptance and subject to change without notice.

"The above outfit to be installed complete on your ranch near Orondo, with the understanding that you dig the pit and trench and furnish one man and team to help on the in-

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stallation, and that you build the foundations after plans furnished you by us.

"The above for the net sum of sixteen hundred and ninety-four dollars (\$1694). Terms, \$130 with the order, \$400 when the machinery is delivered on your ground, and the balance thirty days after the plant is complete and tested, provided that the test is not delayed through any cause which is not our fault."

The respondent alleged that it had performed its part of the contract in all respects, except as it had been hindered and prevented from doing so by the failure of appellant and his neglect to dig a pit and trench of sufficient and adequate size to build foundations, as provided for in said contract; and the complaint prays for the entire sum remaining unpaid on the contract.

Appellant answered, admitting the execution of the contract, but asserting that the same was not all of the contract between the parties, inasmuch as no time was named therein within which the installation was to be made, and alleged that the plant was to be installed within a reasonable time, to wit, within thirty days, and within time for the irrigation of the crops for the season of 1910; and appellant denied each and every other material allegation in the complaint. He also set up a counterclaim in which he sets out the contract and alleges failure of the respondent to erect the pumping plant within a reasonable time or at all, and alleged that, by reason of such failure, his fruit crops for 1910 and 1911 were damaged in the total sum of \$10,000. He alleged that the respondent had full knowledge of the extent of appellant's orchard, the purposes for which the pumping plant was to be used, the necessity of receiving water from this particular source, and the probable damage that would be caused by a failure to install the plant as required.

Respondent replied, putting in issue material allegations of the counterclaim, and further alleging that the pump referred to in the contract was one of special manufacture and had to be manufactured after the contract was executed; that

the delay, if any, was caused by an accident occurring on the railroad at Wenatchee, in which the plant was injured. The appellant replied, putting in issue the affirmative matter of the answer to appellant's counterclaim.

The cause was brought on for trial before a jury, and after the evidence was all in, including the rebuttal evidence of respondent, the court, on motion of respondent, discharged the jury and rendered a judgment in favor of respondent on the contract for the full amount unpaid thereon, including interest and costs, and dismissed the counterclaim of appellant. Appellant unsuccessfully moved for a new trial.

The evidence in the case shows that the goods were shipped by steamboat from Wenatchee up the Columbia river and discharged on a gravel bank near Wagner's ranch, at what is known as Wagner's landing. The machinery was shipped at different times. Part of it arrived at Wagner's landing about June 10, 1910, but the pump frame, a large steel frame about thirty feet long intended to be set in the well or pit and which had been injured in the wreck at Wenatchee, did not arrive at Wagner's landing until about July 17, 1910. It also was unloaded from the steamboat upon this gravel bar, between ordinary high and low water mark, and never thereafter moved by either party. The well on Wagner's ranch, where this machinery was required, was distant about 250 or 300 feet up a very steep and rocky bank from the place where the pump and machinery were deposited. The contract provided that the machinery was to be installed complete on appellant's ranch, and it also provided that the first payment of \$400 was to become due when the machinery was delivered "on your ground." The evidence shows that the pump frame alone weighed 2,785 pounds. There was considerable other machinery and apparatus.

Respondent contended, and the trial court took the view, that the delivery as made was a substantial delivery, being at or near respondent's ranch; and that, in case it was not, the failure of appellant to object to such delivery waived ex-

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act compliance with the terms of the contract. Under the contract as made by the parties, this machinery was to be installed and placed in the well by respondent. In referring to delivery upon the ground of appellant, the contracting parties could have provided that the first installment of the purchase price should be made upon delivery at the landing of the boat company on the bank of the Columbia river at Wagner's landing, or near Wagner's land. But their contract did not so provide. In fact, it was specific that it was to be installed as a pumping outfit upon appellant's land, and must, therefore, have necessarily contemplated that it was to be installed where it could be used, that is to say, in appellant's well, and that the first installment should be paid when delivered upon appellant's land.

Respondent, on the other hand, contends that the strict compliance with this feature of the contract was prevented by reason of the failure of appellant to put in a foundation, as required by the contract. The evidence of appellant is that he dug the pit and trench; that he procured a supply of timbers for the purpose of building the foundation at the pit or well; that respondent failed to furnish any definite plans for the construction of the foundation; and that, if definite plans had been furnished, or if respondent had proceeded with the installation of the pump, he could have built the foundation in one day.

A paper was introduced in evidence as respondent's exhibit 5, upon the supposition that it was the plan for the foundation. Respondent's principal witness later admitted, however, that it was merely given to appellant to show the connection between the steel frame which respondent was furnishing and the wood frame which appellant was to erect. This was a mere pencil drawing or a sketch of the proposed structure. There were no details upon it and it was not drawn to scale. The respondent's principal witness excuses his failure to deliver plans for the foundation upon the ground that appel-

lant said he did not require plans; that he was a carpenter and bridge builder, and that he could build a foundation. Appellant, however, denied this, and testified that the plans were so incomplete that, although he was a carpenter and bridge builder of considerable experience, he was unable to complete the foundation without additional information, for the reason that the plan contained no scale and nothing to indicate the size or the distance apart of the timbers. He was required by the contract to build upon plans to be furnished by respondent. This, of course, meant intelligible and workable plans. In fact, upon every issuable fact involved in the case, except that a written contract was entered into between the parties and that nothing but \$130 had been paid, there was a conflict of evidence between them.

Respondent, however, insists that, as to the law of the case, a substantial performance was shown by undisputed testimony, and that the modern rule permits recovery without a strict and literal performance if there has been a substantial performance and the contractor has attempted in good faith to perform the contract; citing 3 Page on Contracts, § 1385, and *Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009.

But the same authority—Page—contains a further statement of the law:

“If a contract has been performed substantially and deviations from the contract have been made, but not willfully or in bad faith, the party so performing can recover the contract price, less the amount of damages caused by such deviation. The amount of such damages is usually the expense of completion according to the contract.”

In the case at bar, respondent sued to recover, and was permitted to recover, the entire amount of the contract according to his own theory, upon mere substantial performance of the contract and not literal performance; while appellant insists that the delay was wilful and inexcusable on the part of respondent.

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Respondent further insists that appellant, by his acts and conduct, waived complete performance of the contract, and that, therefore, it is entitled to recover upon the entire contract. There is nothing whatever in the evidence that we can see by which it can be rightfully contended that appellant waived the strict performance of the contract. On the contrary, there is evidence that, at numerous times, he requested to know when respondent would complete its installation of the pumping plant. This, to be sure, is contradicted, but that merely constitutes a conflict in the evidence and was for the jury to pass upon. He did not consider that the machinery had been delivered to him according to the contract; and it would seem that, under some circumstances and under some contracts, the delivery of goods, wares, or merchandise at a distance of two hundred and fifty or three hundred feet down a very steep hill would be practically equivalent to delivery, under other contracts and under other circumstances and conditions, of goods, wares, and merchandise at a wharf or landing a great distance away. If he moved this heavy machinery he did so at some risk of injuring it, and also he would then have been considered as accepting such delivery, and that before installation by respondent. We are, therefore, satisfied that the questions of whether or not there had been a substantial delivery of the machinery, and of whether or not substantial delivery thereof had been waived by any acts or conduct of appellant, either should have been resolved as questions of law in favor of appellant, or were questions of fact to be determined by the jury. We consider that under the conditions and circumstances pleaded and shown, they were questions of fact.

Another question is raised by appellant which we consider necessary to pass upon. It is contended that the court erred in refusing to permit appellant to introduce evidence showing that the question of the time of delivery and installation was discussed and considered by the parties at the time of making the contract, for the purpose of showing what was a reason-

able time within which to make delivery. It was contended by appellant, and attempted to be shown on the trial below, that it was considered by the parties that the delivery and installation of the pumping plant should be within thirty days, or by May 20, 1910, or, at any rate, in time for the irrigation of appellant's orchard within June, July or August of that year.

The contract is complete upon its face, lacking only the element of time, and parol testimony that a particular time was expressly agreed upon is generally excluded under the familiar rule that parol evidence of a prior or contemporaneous oral agreement is not competent to vary, alter, contradict, or add to the terms of a written contract. Numerous cases are cited to sustain this proposition, among others that of *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163. In that case it was said, in consonance with the weight of authority, that:

"It is elementary that if a contract specifies no time, the law implies that it shall be performed within a reasonable time. 9 Cyc. 611. It is also well established that the legal effect of a written contract, though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence, than if the legally implied effect had been expressed in the written terms. 'The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language,' " citing many cases.

The situation here, therefore, is that, inasmuch as the contract was silent as to the time of performance, the law implies a reasonable time to perform the contract, and what was or is a reasonable time under the circumstances, and within the contemplation of the parties, was a question of fact to submit to the jury upon competent evidence, and not a question of law. The case cited by respondent, *Kleeb v. Long-Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202, to the

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point that it is a question of law for the court to determine what was a reasonable time, is not in point here, for the reason that in that case it was merely held by the court that a reasonable time had elapsed for the defendant to object to the quality or manner of delivery of the lumber, owing to the peculiar circumstances in that case. There are frequently cases where the court may safely rule that the time elapsed wherein a party should do or should not do a certain thing is unreasonable, for the reason that, under some circumstances and conditions, the passage of an unreasonable length of time must be conclusively presumed against the party. In general, however, the question of what is a reasonable time is one of fact and to be determined as such.

For these reasons the judgment is reversed, and the cause remanded for new trial.

MORRIS, C. J., BAUSMAN, PARKER, and MAIN, JJ., concur.

[No. 12856. Department Two. January 15, 1916.]

CASE THRESHING MACHINE COMPANY, *Appellant*, v.
H. E. WILEY *et al.*, *Respondents*.¹

HUSBAND AND WIFE — COMMUNITY DEBT — SURETYSHIP. Where a husband signed a note as surety only and received no consideration, it is not a community debt and judgment against the community is properly denied.

EVIDENCE — BEST AND SECONDARY EVIDENCE — LETTERS — SEARCH — DILIGENCE. Secondary evidence as to the contents of a letter is inadmissible on the ground that no diligent search had been made for it, where the witness stated that he had short notice, had searched through his desk and did not find it, and presumed he had it in the file, and counsel asked for a continuance so that it could be produced.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 27, 1914, upon findings in favor of the defendants, denying a deficiency

¹Reported in 154 Pac. 437.

judgment upon the foreclosure of a chattel mortgage, tried to the court. Affirmed.

Shorett, McLaren & Shorett, for appellant.

Chas. M. Fouts, for respondents.

MAIN, J.—On September 19, 1912, one H. E. Wiley purchased from the plaintiff an automobile for \$1,800. Of this purchase price, \$100 was paid at the time of the sale, and notes were given for the balance secured by a chattel mortgage upon the automobile. One C. T. Dearborn signed the notes with Wiley, but did not sign the mortgage. The notes not being paid as they became due, an action was brought, and a judgment of foreclosure entered. The automobile was sold under the decree, but did not bring a sufficient sum to pay the balance due upon the purchase price. The plaintiff sought a deficiency judgment against Wiley and wife, and Dearborn and wife, and also an individual judgment against Wiley and Dearborn. The court declined to enter a deficiency judgment against the community composed of Dearborn and wife. From this judgment, the plaintiff appeals.

It is claimed that the court erred in refusing to enter a judgment against the community composed of Dearborn and wife. Whether such a judgment should have been entered depends upon whether, when Dearborn signed the notes, he was engaged in a transaction for the benefit of the community. It is claimed by the appellant that Dearborn was to receive a commission of \$50 when the purchase price of the automobile should be fully paid. The evidence as to whether or not Dearborn was to receive a commission was conflicting. The trial court found that Dearborn signed the notes as surety only, and that the transaction was not for the benefit of the community composed of himself and wife. After a careful consideration of the evidence, no good reason appears why the finding of the trial court should be disturbed.

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If Dearborn signed the notes as surety merely, and was to receive no commission, the transaction was not for the benefit of the community, and no community liability would result. *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320.

During the trial of the case the appellant sought to prove, by secondary evidence, the contents of a letter claimed to have been written by Dearborn's attorney to an agent of the appellant. This evidence was rejected because no proper foundation had been laid. While the agent of the appellant, who claimed to have received the letter, was testifying, he was asked the question whether he had received such a letter, and answered that he had. He was then asked if he had made a search for it, and replied:

"A. Yes, sir. I searched for the letter today. Of course I did not know that I was going to be on this case until last night at 8 o'clock. Q. Well? A. I searched for the letter through my desk today but did not find it. I presume I had it in the file."

Thereupon he was asked to state the contents of the letter. Objection was interposed and sustained upon the ground that the proper foundation had not been laid. At the conclusion of the trial, the appellant requested the trial court to leave the case open for a day or so "until Mr. Wilson could make a search for that letter;" stating, "he has no doubt got that letter, and it seems to me it is very material."

It is a mandate of the law that proof of a fact must be made by the best evidence obtainable. Secondary evidence of the contents of a letter can only be admitted when it is made clearly to appear that diligent search has been made for the primary evidence, and that it cannot be found or produced. *State v. Erving*, 19 Wash. 435, 53 Pac. 717; *Kennedy v. Canadian Pac. R. Co.*, 87 Wash. 134, 151 Pac. 252. In this case, it did not appear that diligent search had been made for the letter and that it could not be produced. The request to the trial court to keep the case open for a day or

so until a search could be made for the letter would seem to negative the idea of a previous diligent search.

Finding no error, the judgment will be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12866. Department Two. January 15, 1916.]

FRED BARNHART, *Respondent*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant*.¹

NEGLIGENCE—DANGEROUS PREMISES—THINGS ATTRACTIVE TO CHILDREN—PONDS. Under the tendency to limit, rather than extend, the doctrine of the turntable cases, a pond is not such an agency attractive to children as will probably result in injury to those attracted to it; hence a railroad company is not liable for the death by drowning of a child of tender years attracted to a pond of water impounded on its premises by its grade.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 17, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Geo. W. Korte, for appellant.

M. J. McGuinness, for respondent.

MAIN, J.—The plaintiff brought this action for the purpose of recovering damages for the death of his son, a child eight years of age. The cause was tried to a jury. At the conclusion of all the evidence, the defendant challenged the sufficiency thereof, and moved for a directed verdict. This motion was denied. The jury returned a verdict for the plaintiff in the sum of \$650. Judgment being entered upon the verdict, the defendant appeals.

The facts briefly stated are: During the latter part of the year 1911, the appellant railway company was complet-

¹Reported in 154 Pac. 441.

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ing the construction of its branch line from Cedar Falls to Everett. This line passed through the city of Snohomish. Where the line passed through this city it was upon low lands adjacent to the Snohomish river, and a considerable embankment or fill was made upon which the rails and ties were laid. About twelve hundred feet from the west boundary of the city, the railroad grade met a hill which was to the north of the grade. The hill had an elevation of approximately twenty-five feet, upon the side of which grew brush or small trees. The meeting of the grade and the hill at this point left a depression between the two in which either surface water, or flood waters of the river, were impounded and created a pond. The pond was entirely upon the right of way of the railway company. On the bank or hill to the north, there was an old picket fence through which there were a number of openings. Above this hill was what is known as Second avenue. Before the embankment was constructed, the flood waters from the river would at times form a pond in the same vicinity as the pond in question, but a little further south, to which boys would resort for the purposes of play, as they did upon this pond. After the pond in question had been formed, the boys of the neighborhood were accustomed to gather for play, and had constructed a raft out of old railroad ties, or other timbers. The water in the pond was from eight to ten feet deep at the deepest point. In reaching the pond, it was necessary for the boys to go upon and across the private property of the railway company.

On February 3, 1912, the two sons of the respondent, respectively eight and six years old, were upon the raft upon the pond, at play, when the older of the two fell into the water and was drowned. This action, as already indicated, was brought by his father.

It is claimed that the railway company was negligent in failing to drain the pond. The controlling question in the case is whether the owner of the property upon which a pond

is formed, where the boys of the neighborhood resort for play, is guilty of negligence in failing, either to drain the pond, or fence his property against such intrusion. The general rule, of course, is that the private owner of land is not liable to strangers who come thereon without any invitation, express or implied, and receive an injury from some agency upon the premises.

An exception to this general rule is made by what is known as the doctrine of the turntable cases. According to this doctrine, damages may be recovered from the owner for the death or injury of a child of tender years even though technically a trespasser, and who has been attracted to the place of the accident by a dangerous agency which is in the nature of an attractive nuisance. *Railroad Co. v. Stout*, 17 Wall. 657; *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262.

The turntable doctrine has been adopted by the courts of last resort in a considerable number of states, and rejected by almost an equal number. There is a tendency generally on the part of courts which have approved the doctrine to limit, rather than extend, its application. *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. 847; *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858, Ann. Cas. 1913 A. 1025, 35 L. R. A. (N. S.) 440. In the case last cited, will be found a review of the cases which support the statement as to the tendency to limit the doctrine.

The question here presented is not whether the owner of property may be liable, (a) by reason of a trap or pitfall upon his property which may produce the death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity or so near a highway that in the use of the highway an accident may occur; but is whether a pond of water is a dangerous agency such as will subject the owner of the property to liability for damages for the death of a child of tender years attracted to the pond for the purpose

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of play. The turntable doctrine makes the owner liable because the dangerous agency was attractive to children of tender years, and in playing about or with such agency, accident or injury would probably result.

That a pond of water is attractive to boys for the purposes of play, swimming, and fishing, no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely to, or will probably result in, injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming, and fishing, is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the turntable cases. There are a number of analogous cases which would support the holding that an owner is not liable for the death of a child drowned in a pond. But in this case it is not necessary to support the holding by analogous cases when there is ample direct authority upon which it may be rested. *Emond v. Kimberly-Clark Co.*, 159 Wis. 88, 149 N. W. 760; *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L. R. A. (N. S.) 263; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. 106; *Thompson v. Illinois Cent. R. Co.*, 105 Miss. 636, 63 South. 185, 47 L. R. A. (N. S.) 1101; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 72 Am. St. 597, 42 L. R. A. 288. Those cases are all from courts that approve the turntable doctrine. In each of them a boy had lost his life by drowning, the youngest of which was four and the oldest eleven years; and in each of them it was held that there was no liability for the death of a child that occurred in an artificial pond. In the *Peters* case, it was said:

“It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philos-

ophy of the rule *ought* to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall.”

In the *Sullivan* case, after reviewing the authorities, it was said:

“Without citing other authorities, we are persuaded that the conclusions in the cases cited and the reasoning upon which they are based are correct, and that in a case such as the one at bar it would be unjust to hold the landowner liable for the death of, or injury to, a child of ten years of age. We do not consider that the appellee was negligent in not taking steps to prevent the trespassing upon her land by boys of such age as plaintiff’s intestate. To hold landowners responsible under such circumstances would be to impose upon them an oppressive burden, and shift the care of children from their parents to strangers. Every man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools, and other bodies of water.”

The case of the *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. 114, 27 L. R. A. 206, in its reasoning is out of harmony with the cases above cited; and it is the only case, so far as our information goes, which would sustain liability. That case could have been rested upon a different ground and brought within one of the classes in which it is well recognized that liability exists. It is not, however, so rested.

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The respondent relies upon the case of *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331. That case, however, is distinguishable from this. There a child, three years old, was drowned by falling into an opening in a flume which was twenty-four inches square. The flume, other than this particular opening, was covered. This was a dangerous agency which was attractive to children, and in the event a child should fall into the flume, death by drowning was inevitable. It was not of the same nature as a pond where children are accustomed to play, and where comparatively few lose their lives by drowning. In the *Bjork* case, *City of Pekin v. McMahon supra*, was cited as analogous; but in citing that case, it was not the intention of the court to adopt all of the reasoning contained in the opinion. To hold that a pond is an attractive nuisance within the doctrine of the turntable cases would be an extension of that rule beyond its proper limitations.

The judgment will be reversed, and the cause remanded with directions to dismiss.

MORRIS, C. J., BAUSMAN, PARKER, and HOLCOMB, JJ., concur.

[No. 12875. Department Two. January 15, 1916.]

GLENN HUBBARD, *Appellant*, v. R. H. JOHNSON *et al.*,
Respondents.¹

AGRICULTURE—LIEN ON CROPS—ELOIGNMENT—DAMAGES—LIABILITY OF MORTGAGEE—STATUTES. Under Rem. & Bal. Code, § 1188, giving a lien for farm labor upon crops superior to that of a prior chattel mortgage, and §§ 1190a and 1181, providing that "any person who shall elogn . . ., or who shall render difficult, uncertain or impossible of identification" the chattels upon which there is a lien, shall be liable to the lien holder for the damages to the amount secured by his lien, prior mortgagees of a crop of wheat are liable to the lien holder where the wheat, on their instructions, was delivered at a warehouse as their wheat and commingled with other wheat as it was received without anything to identify it, and they thereafter sold the wheat and indorsed negotiable bills of lading issued to them therefor; since they rendered it "difficult, uncertain or impossible of identification" within the statute whether guilty of eloignment or not.

SAME—LIEN ON CROPS—BONA FIDE PURCHASERS—LIABILITY. In such a case, under Rem. & Bal. Code, § 1177, providing that a party purchasing the property liened upon is not an innocent third party or *bona fide* owner unless he discharges the lien, mortgagees so taking the crop after the adjudication of the lien, although without actual notice of it, take subject to all the rights of the lien holder, and are liable for the amount of the lien.

SAME—REMEDIES. In such case, it is immaterial whether the action be one to foreclose the lien or recover damages for destroying or confusing the identity of the crop.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered March 23, 1915, upon findings in favor of the defendants, dismissing an action in tort, tried to the court. Reversed.

Herbert C. Bryson and *John A. Metcalfe*, for appellant.
Sharpstein, Pedigo, Smith & Sharpstein, for respondents.

HOLCOMB, J.—Appellant brought this action against the respondents for damages for the eloignment and conversion

Reported in 154 Pac. 457.

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of a quantity of wheat consisting of 2,460 sacks, grown by one Lonneker and wife, upon whose crop appellant had performed farm labor between November 1, 1912, and May 31, 1913, and upon which, on June 13, 1913, he filed his claim of lien for his labor, which was adjudicated in his favor on October 29, 1913, by a judgment of the superior court of Walla Walla county.

Upon issue being joined in this case and a trial had, the court made findings, in substance, as follows: That, on June 12, 1913, plaintiff had a lien, by reason of labor performed, upon a quantity of wheat consisting of 2,460 sacks, being the same wheat referred to and described in the complaint, which lien was, at the time of the trial of this action, a subsisting valid lien in the sum of \$271.96; that the wheat was grown by one August Lonneker upon a farm situated in Walla Walla county near Clyde, and that the defendants had a mortgage upon the crop, executed by Lonneker, to secure indebtedness due defendants, and, as far as appears from the evidence, neither of the defendants had any knowledge of the pendency of the foreclosure action on lien; that the wheat was harvested by Lonneker and, after being harvested, was moved by him to a public grain warehouse at Clyde, and that neither of the defendants had anything to do with the removal of the wheat from the field; that, upon the same being removed to the warehouse, negotiable warehouse receipts therefor were caused to be issued by Lonneker to the defendants herein, which warehouse receipts were thereafter delivered to the defendants; that, so far as appears from the evidence, the defendants had nothing to do with the issuance of the warehouse receipts; that thereafter and while the wheat was in the warehouse, the defendants sold the wheat to Dement Brothers Company and Jones-Scott Company, both incorporated, and indorsed and delivered to the purchasers the warehouse receipts, which warehouse receipts were negotiable in form; that if the wheat was thereafter removed from the warehouse or from Walla Walla county, or

commingled with other wheat, so far as appears from the evidence, neither of the defendants had anything to do with such acts further than the sale of the wheat and the indorsement of the warehouse receipts.

Upon these findings, the court concluded that the action should be, and it was, dismissed.

I. The only question presented for consideration upon this appeal is whether respondents are liable to the appellant under Rem. & Bal. Code, § 1181 (P. C. § 309 § 51). Section 1188 (P. C. § 309 § 105) of the code is as follows:

“Any person who shall do labor upon any farm or land, in tilling the same or in sowing or harvesting or threshing any grain, as laborer, contractor, or otherwise, or laboring upon, or securing or assisting in securing or housing any crop or crops sown, raised, or threshed thereon during the year in which said work or labor was done, such person shall have a lien upon all such crops as shall have been raised upon all or any of such land, for such work or labor.”

Section 1190 (P. C. § 309 § 109) of the code provides that a claim of lien shall be filed with the auditor of the county within forty days after the close of the work or labor. Section 1190a of the code secures to all lien holders for farm labor the same rights and privileges as are secured to holders of liens on logs under the provisions of chapter 7 of the code. Under that chapter, § 1181 provides:

“Any person who shall eloin, injure or destroy, or who shall render difficult, uncertain or impossible of identification any sawlogs . . . upon which there is a lien as herein provided, without the express consent of the person entitled to such lien shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment . . . against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person.”

The trial court seems to have based his conclusion and decision in this case upon the case of *Lohman v. Peterson*, 87

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Wis. 227, 58 N. W. 407. In that case it appeared that, under a statute of Wisconsin, any person who concealed or transported out of the state logs on which there was a lien should be liable as for conversion. There was nothing in that statute, so far as appears, rendering any person liable except the person concealing or transporting the liened logs out of the state. The defendant had sold the ties on which the lien was attempted to a railroad company, and the railroad company had transported the ties from the state. The action was brought against the original owner of the logs as for conversion, for having "caused the removal of the logs from the state." It was held, therefore, that the defendant had not transported the logs from the state and was not liable. It was also held that "the railroad company took them subject to any claim which the plaintiff had against them," under the statute providing for a lien against such logs for labor performed upon them.

It is expressly provided in the section of the statute providing for actions upon eloignment (§ 1181, *supra*), that any person eloigning, etc., or rendering difficult, uncertain or impossible of identification any logs upon which there is a lien, etc., shall be liable to the lien holder for damages to the amount secured by his lien. It is also provided that, in a civil action to enforce the lien, the party so eloigning, or rendering difficult or uncertain of identification, may be made a party to the action and a personal judgment entered against him; or, if he is not a party to the lien action, damages may be recovered by a civil action against such person. So it was held in *Peterson v. Sayward*, 9 Wash. 503, 37 Pac. 657, that damages may be awarded for the destruction of logs in the action to enforce the lien thereon, or they may be recovered in a separate action. See, also, *Singer v. Wallace*, 8 Wash. 576, 36 Pac. 466.

Under Rem. & Bal. Code, § 1177 (P. C. 309 § 43), the statute relating to liens upon logs, etc., it is provided that:

"It shall be conclusively presumed by the court that a party purchasing the property liened upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a *bona fide* owner of the property liened upon, unless it shall appear that he has paid full value for the property, and has seen that the purchase money of the property has been applied to the payment of such *bona fide* claims as were entitled to liens upon the said property under the provisions of this chapter, according to the priorities herein established."

Under § 1188 (P. C. 309 § 105), relating to liens for farm labor, it is provided that the lien given to laborers for working upon and growing farm crops is superior to all other liens thereon, including that of a prior chattel mortgage; and this was upheld in *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303. It appears to us that the court misconstrued the decision in the Wisconsin case cited, and that his construction of the law in this case was not in harmony with our statutes and decisions.

II. Respondents maintain that, at any rate, there was no eloinment shown in this case as eloinment has been defined by us in the case of *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463. In that case it was said:

"But the new law introduces a new ground of damage, viz., 'eloinment', and it was to the charge of eloinment alone that there was any testimony in the case against appellant. To 'eloin' is to take away beyond the jurisdiction, or to conceal, so that under the new law it is possible that the construction would be that the mere removal of logs under lien from the county would cause the right of action for damages to accrue. . . ."

The construction of the word "eloinment" or removal or concealment of the liened chattel is immaterial here, for the reason that there are other acts and conditions under the statute which render third persons liable to the lienor as conversioners, viz., rendering difficult, uncertain or impossible of identification.

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III. The evidence shows that both Lonneker and the defendants instructed the warehouseman where the wheat was hauled to issue receipts therefor to defendants. The wheat, accordingly, as fast as it came in, was commingled with other wheat in the warehouse and not marked or identified as the wheat of Lonneker taken from the land and crop upon which appellant performed the labor, but marked and identified as the wheat of defendants. It would be hard to see how anything could be done to render the wheat raised by Lonneker, upon which appellant's lien existed, more difficult, uncertain, or impossible of identification. Appellant had an adjudicated lien upon the wheat at the time of the transaction between Lonneker and the respondents. It is common learning that a purchaser of real or personal property, pending litigation concerning the title or the validity of a lien thereon, takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of a court. *Bergman v. Inman*, 43 Ore. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. 771.

"The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset." *Tilton v. Cofield*, 93 U. S. 163.

It can make no difference in this respect whether the action is to foreclose the lien or to recover damages under the statute for destroying or confusing the identity of the property covered by it. *Bergman v. Inman*, *supra*.

There is no doubt, therefore, in our opinion, that appellant is entitled to recover. The judgment is reversed, and the cause remanded with instructions to enter judgment for appellant.

MORRIS, C. J., BAUSMAN, PARKER, and MAIN, JJ., concur.

[No. 12894. Department Two. January 15, 1916.]

CHARLES W. RODGERS, *as Charles W. Rodgers Company,*
Respondent, v. FIDELITY & DEPOSIT COMPANY OF
MARYLAND, *Appellant*.¹

STATES—PUBLIC WORKS—CONTRACTOR'S BOND—ACTIONS—CONDITION PRECEDENT—NOTICE OF CLAIM. Under Rem. & Bal. Code, § 1161, providing that no person shall have a right of action upon the bond of a contractor on public work unless he shall present and file the prescribed notice of claim, the notice of claim substantially in the form prescribed is a prerequisite to suit upon the bond of a contractor on state work.

SAME—SUFFICIENCY OF NOTICE. Rem. & Bal. Code, § 1161, requiring notice of claim against the bond of a contractor on public work to be in substance in a prescribed form, stating that he has a claim, "against the bond," designating the amount, the names of principal and sureties, and describing the work, is not substantially complied with by a mere debit statement against the contractor for a balance due for labor and material furnished; since the sureties have a right to know what claims are being made against them by the filing of the required notice.

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered March 26, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed on defendant's appeal.

Trefethen, Grinstead & Laube, for appellant.

Alfred Gfeller, for respondent.

PARKER, J.—The plaintiff, Charles W. Rodgers, seeks recovery upon a bond executed by the defendant, Fidelity & Deposit Company of Maryland, under the provisions of Rem. & Bal. Code, §§ 1159-1161 (P. C. 309 §§ 93, 95, 97), relating to security for labor and materials furnished upon public works. The trial was before the superior court without a jury, and resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

¹Reported in 154 Pac. 444

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Opinion Per PARKER, J.

In August, 1911, T. Strauser & Son, contractors, entered into a contract with the state of Washington for the construction of a building for the Northern Hospital for the Insane. Appellant became surety upon the contractors' bond, the bond being conditioned as prescribed by Rem. & Bal. Code, § 1161 (P. C. 309 § 21). Respondent furnished labor and material to the contractors in the construction of the building. In December, 1912, the building being completed, it was accepted by the state board of control. About the time of the completion and acceptance of the building, respondent filed with the state board of control a paper which he claims was sufficient notice of his claim against the bond as required by Rem. & Bal. Code, § 1161. The paper so filed with the board of control by respondent reads as follows:

"State Board of Control, Seattle, Nov. 29, 1912.

"Olympia, Wash.

"Gentlemen: Enclosed we hand you statement of unsettled balance due us on labor and material furnished T. Strauser & Son for the Northern Hospital for Insane, Sedro-Woolley, Wash. that proper precautions may have been taken.

Yours respectfully,

"Chas. W. Rodgers Co.

"By A. P. Robinson.

"P. S. Will you please let us know with what Bonding Company this company is bonded on this work. Enclosed find stamp for reply. R.

"Chas. W. Rodgers Co. Jobbers and Contractors

"T. Strauser & Son, Seattle, Nov. 27, 1912.

"Spokane, Wash.

Aug. 28 Balance1001.69
Balance due on labor and material furnished them in Northern Hospital for Insane, Sedro-Woolley, Wash.

"To State Board of Control,

"Olympia, Wash."

The only question we are called upon to consider is as to the sufficiency of this communication to the board of control as a notice of claim against the bond executed by appellant, as surety, entitling respondent to sue appellant as surety

has no right to recover against appellant as surety upon the bond, and that therefore the judgment must be reversed. It is so ordered.

Respondent, Rodgers, has given notice of, and prosecutes, a cross-appeal, claiming error of the trial court in disallowing him certain claimed costs and disbursements. In view of our disposition of the appeal of Fidelity & Deposit Company, the cross-appeal of Rodgers need not be further noticed.

Appellant, Fidelity & Deposit Company, will recover its costs, both in the superior court and in this court.

MORRIS, C. J., BAUSMAN, HOLCOMB, and MAIN, JJ., concur.

[No. 12918. Department Two. January 15, 1916.]

ED. E. HARDIN *et al.*, *Respondents*, v. OLYMPIC PORTLAND CEMENT COMPANY, LIMITED, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction upon the measure of damages when it could not have misled the jury when taken in connection with other instructions, some of them given at the request of the appellant.

NUISANCES—PERMANENT NUISANCE—DEFINITION—LAWFUL BUSINESS—NUISANCE PER SE—INSTRUCTIONS—DAMAGES. An instruction correctly defining what would amount to a permanent nuisance to adjoining property through the operation of a lawful business upon defendant's property, and permitting recovery therefor as a matter of law, is not necessarily erroneous in inappropriately defining the same as a nuisance *per se* when a lawful nuisance is never a nuisance *per se*; since the operation of a lawful business may become a nuisance in fact, the determination of which is a question of fact, and the defendant could not operate its business in the manner so properly defined in the instruction without compensating the adjoining owner for the damages actually suffered.

SAME—MEASURE OF DAMAGES. In such a case, when the injury and damage are established, the measure thereof should be that most beneficial to the injured party entitled to enjoy his property intact.

SAME—PERMANENT NUISANCE—PRIVATE INJURY—RELIEF—DAMAGES—RIGHT TO PERMANENT DAMAGES. An adjoining landowner may sue

¹Reported in 154 Pac. 450.

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Opinion Per HOLCOMB, J.

once for all to recover temporary damages for past injuries to his crops and fruit trees, and for permanent damages to his freehold, suffered through the lawful operation of defendant's cement plant, which threw off fumes and gases and cast particles upon plaintiffs' premises, upon the theory that the same was a permanent nuisance even if it were not a nuisance *per se*, where the defendant intended to maintain the same and could not avoid the injury; since plaintiff in such case has recourse to relief in damages as less onerous and harsh than equitable relief by injunction.

SAME—PERMANENT DAMAGES—SCOPE OF RELIEF—JUDGMENT—BAR. In such a case, the framing of plaintiffs' action precludes any further legal or equitable relief for any injury or damage in the future to respondents' real estate and the enjoyment thereof, by the lawful operation of defendant's plant.

SAME—PERMANENT DAMAGES—DEFENSES—INTENT TO DISCONTINUE. In such a case, defendant cannot assert that the injury is not a permanent one for the reason that the same might be discontinued, where all of the evidence tended to show that the business was more or less permanent and that a substantial plant had been erected with a large amount of materials at hand; since an intention to discontinue and its temporary character could have been the subject of proof.

SAME—PERMANENT DAMAGES — ACTION TO RECOVER — ISSUES AND TRIAL. Where, in such a case, on objection to testimony, counsel for plaintiff stated the theory of the action, and that recovery of permanent damages would include any future damages, whereupon defendant withdrew the objection, in order to avoid permanent damages it was incumbent upon the defendant to show that the nuisance would be discontinued; and the plaintiff was estopped to claim any other or additional relief in any other form of action.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered November 25, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages from a nuisance. Affirmed.

Hadley, Hadley & Abbott, for appellant.

Hurlbut & Neal and *Romaine & Abrams* (*Ed. E. Hardin, in propria persona*), for respondents.

HOLCOMB, J.—Respondents own fifteen acres of land near Bellingham, Washington, and the appellant owns a tract of

land lying immediately southerly of, and contiguous to, the lands of respondents. Prior to May 1, 1913, appellant constructed upon its land a large plant for the manufacture of Portland cement, and on or about that date began the manufacture of Portland cement in its plant, and has from that time continued such manufacture to a greater or less degree.

Respondents' complaint proceeds upon the theory that appellant owns in fee the site of the cement plant and large deposits of clay and limestone used in the manufacture of cement sufficient to supply its plant and operate it to its full capacity for more than fifty years, and that the capacity of the plant at present is about one thousand six hundred barrels of cement per day. It is alleged that appellant intends to continue to manufacture, handle, and dispose of cement at its plant as it now is. It is alleged that, in the process of the manufacture and in the handling and disposing of the cement, noxious fumes and gases and particles of cement materials and cement were thrown out from the plant and carried by the prevailing winds in, over, and upon respondents' premises, penetrating the dwelling house and rooms, and injuring and destroying vegetation, and that respondents' premises are no longer desirable, comfortable, or valuable as residence property; that they have been greatly depreciated in value, and that, by reason of the things alleged in the complaint, this depreciation is permanent.

Appellant, by answer, admits that it owns in fee the deposits of clay and limestone, and is taking and using in its cement plant raw materials used in the manufacture of cement; that it has deposits sufficient to supply materials for the operation of the plant at its full capacity for more than fifty years; that it now manufactures about eight hundred barrels per day; that its present capacity is about sixteen hundred barrels of cement per day, and that it intends so to continue the manufacture of cement. It denies the allegation that large bodies of cement and the constituent elements thereof were blown by the prevailing winds in, over, and

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upon the premises of respondents, and deposited thereon; denies the injury to the crops, shrubs, trees, fruits, and grasses of respondents, as alleged, and denies generally the allegations of damage in the complaint.

I. Complaint is made of the tenth instruction given by the court to the jury, as follows:

"You are further instructed that, if you find from the evidence by a fair preponderance thereof, that the plaintiffs' land in the complaint described has been materially damaged by the operation of its cement plant, in the manner alleged in the complaint, and that such damage is permanent in character, then I instruct you that, in estimating the plaintiffs' damages to their said land the measure of such damages is the difference between the market value of the land as it was immediately before it was so damaged and the market value of the same in its damaged condition at the time of the bringing of this action, to-wit, August 6, 1914, as a result of the operation of the defendant's cement plant."

Appellant contends that the giving of this instruction was error, for the reason that it incorrectly states the measure of damages in cases of permanent nuisance; that the proper rule in case of permanent nuisance is the difference in market value before and immediately after the injury; citing *Hunt v. Johnson* (Tex. Civ. App.), 129 S.W. 879; and *Missouri, K. & T. R. Co. v. Dennis* (Tex. Civ. App.), 84 S. W. 860. The theory on which this contention is based is that the instruction resulted in permitting the jury to assess double damages. Respondents sued to recover \$175 as temporary damage by reason of the injury to and loss of crops, as well as for the sum of \$2,824.99 for permanent damages to their freehold. Respondents do not question the correctness of the rule contended for by appellant, but insist that the instruction complained of is the equivalent of an instruction numbered six by the court which was given as requested by appellant, which limited the consideration of the jury of the question of damages to the fruits, trees, grass, shrubbery, etc., and instruction number seven given by the court

as to such items of the damage, stating the measure of damages to be the difference between the market value of the crops at the time of receiving the injury and their market value in the injured condition at the time the injury was received. We think there is no merit in the contention that the jury could have been misled into awarding double damages by reason of that instruction, in so far as this one contention is concerned, taking it in connection with the other instructions given by the court, some of them at the request of appellant.

II. A more serious difficulty is presented by appellant's claim that the eleventh instruction of the court was erroneous, in that the facts specified by the court to the jury as establishing the plant as a nuisance *per se* do not in law constitute a permanent nuisance nor warrant the application of the measure of damages allowed in the case of permanent nuisance.

By the portions of that instruction which are complained of, the jury was told that, if (a) the character of its construction and equipment is modern, (b) the machinery and appliances are so placed and adjusted as to function properly and are properly and skillfully operated, (c) under such conditions the prevention of injury and damage upon which the instruction is predicated is not had, (d) such fumes, etc., are carried upon respondents' property by the prevailing winds and settle and interfere with the comfortable enjoyment of the property, or materially damage the same, and (e) in the careful and skillful operation of the plant, as so constructed and at its present capacity, it will necessarily continue to throw off such gases, etc., and that the same will be carried over and upon and injure respondents' property; then, as a matter of law, appellant's plant would be a nuisance *per se*, and that, as a matter of law, any damages to respondents' land, resulting in the depreciation of the value of the land, would be permanent, and it would be the duty of the jury to assess damages for such permanent deprecia-

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tion of the value of the land not exceeding the amount sued for.

"A nuisance *per se* is an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances." 21 Am. & Eng. Ency. Law (2d ed.), p. 683.

The court in the instruction criticized may have used the term "nuisance *per se*" inappropriately, for there is much apparent conflict of authority on the question whether or not a lawful business or erection can be a nuisance *per se*, but the instruction is not vitiated by such definition. Since there must be some place where every lawful business may be lawfully located or carried on, the better rule would seem to be that a lawful business is never a nuisance *per se*, but may become a nuisance by reason of extraneous circumstances, such as being located in an inappropriate place, or conducted or kept in an improper manner. 21 Am. & Eng. Ency. Law (2d ed.), p. 684; Wood, Nuisances, §§ 529, 530. In such case, it is a nuisance in fact, and the determination is a question of fact. A smelting plant is not a nuisance *per se*, but may be located so as to be one in fact to other property owners. *Sterrett v. Northport Min. & Smelting Co.*, 30 Wash. 164, 70 Pac. 266.

No one has a right, however, to pursue a lawful business, if thereby he injures his neighbor (except such injuries as the public must suffer in common in order to permit lawful enterprises to operate), without compensating such for the damages actually sustained. *Sterrett v. Northport Min. & Smelting Co.*, *supra*. In such case, when the injury and damage are established, the measure thereof should be that most beneficial to the injured party, as he is entitled to have the benefit and enjoyment of his property intact. 28 Am. & Eng. Ency. Law (2d ed.), p. 543; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442.

Appellant contends, however, that respondents could not recover permanent damages unless a nuisance constituted a

nuisance *per se*, and that it was upon that theory that they presented the case and upon which the court submitted it to the jury. And, further, as we understand, that unless a nuisance were a nuisance *per se*, it would not constitute a permanent nuisance, and that the jury were not entitled to award damages on the theory of a permanent nuisance. Respondents, on the contrary, contend that the question of whether it is a nuisance *per se* is not determinative of the question of whether permanent damages may ensue from its maintenance and operation; and further maintain that, unless permitted to sue once for all for damages to the freehold, they would be denied a legal remedy and would be obliged to resort to equity for an injunction closing the industry; that it is the policy of this state and of the law not to enjoin the operation of an industry unless the necessity be great and redress at the hands of the court and jury would be inadequate; citing *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 Pac. 579; 29 Cyc. 1226-1228.

In *Richards' Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202, it was said:

"The chancellor will consider whether he would not do a greater injury by enjoining than would result by refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear he will refuse to enjoin."

In *Owen v. Phillips*, 73 Ind. 284, it was said:

"It is important to keep in mind the fact that the business of milling does not belong to that class which constitute nuisances *per se*. It is also important to sharply mark the distinction between suits for injunction and actions for damages. In the latter class, the remedy is an ordinary one; in the former, the extraordinary powers of the court are invoked. It is not every injury which will support an action for damages that will entitle the complainant to relief by injunction. . . . A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance

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and the business not be stopped, but if injunction issues then the right to conduct the business is at an end. The necessity which will authorize the granting of the writ of injunction, to restrain the carrying on of a business lawful in itself, must be a strong and imperious one."

It would seem, therefore, that the respondents had recourse to that remedy which was least onerous and harsh upon appellant, and that the complaint of the respondents was based upon the theory that they intended to cover every injury and every remedy which they had or could have against appellant for the maintenance and operation of the cement plant and the permanent injury to their freehold, except the stopping of its maintenance and operation. Of course, there may be temporary injuries and damage, such as injuries to crops and the like, arising in the future, but the framing of respondents' action precludes any further legal or equitable relief for any injury or damage in the future to respondents' real estate and the enjoyment thereof, by the lawful operation of appellant's plant.

Appellant says, however, that a nuisance which may be discontinued is not a permanent one. It was admitted by the pleadings that it was the intention of the appellant to continue the operation of this plant, but appellant claims that this admission was not intended to admit that appellant would continue the operation of its plant indefinitely, and that the admission was made prior to the recovery of a verdict for respondents; or, in other words, prior to a judicial determination against its defense. This means, of course, that, it having been judicially determined that the appellant is conducting in a proper manner a lawful business in a place that renders it a nuisance in fact to a neighbor, appellant may discontinue it hereafter. But all the evidence tends to show that its business is more or less permanent; that it has a substantial plant erected, a large amount of money invested, and a large amount of materials suitable for its manufacture at hand. If it were its intention to discontinue the

maintenance of the plant and show that it was of a temporary character, then it was the subject of proof. *Remsberg v. Iola Portland Cement Co.*, 73 Kan. 66, 84 Pac. 548.

During the progress of the trial, objection was made to certain testimony offered by respondents, and thereupon inquiry was made by counsel for appellant of counsel for respondents as to the theory upon which respondents were proceeding. Respondents' attorney thereupon stated to the court and counsel that respondents were proceeding on the theory that they had suffered temporary and permanent damage and were seeking to recover for the damage they had suffered by reason of the alleged nuisance, including both temporary and permanent damages, and if they recovered permanent damages, such damages as they would suffer in the future would be included therein; that the temporary damages were confined to the damage to crops for two years, such as had been sustained up to the time of the filing of the complaint, and the balance of the claim proceeded from a permanent injury to the freehold. Appellant's counsel thereupon stated that appellant withdrew its objection under the statement of counsel.

It is difficult to see why counsel for appellant now insist that the respondents were not proceeding upon the theory that they were recovering upon one cause of action for the temporary damages for injuries to and destruction of crops for the preceding two years, and upon the other cause of action for the permanent injuries to the freehold, which would include all damages of every possible nature to the freehold, for injury, deterioration and depreciation thereof, which had been suffered by reason of the alleged nuisance up to the time of the commencement of the suit. The case of *Cleveland C. C. & St. L. R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875, is cited and quoted as follows:

"During the progress of the trial, objections were made to certain testimony offered by the appellee. 'After said objection was made by the defendant, the court thereupon

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requested plaintiff to state the theory of her complaint, whether she was seeking to recover for a permanent injury to property or for a continuous wrong. Plaintiff's attorney thereupon stated to the court and counsel for defendant that the theory of the complaint was for permanent damages to plaintiff's property. The court thereupon announced that it would be so considered and treated, and he would so instruct the jury. Defendant's counsel thereupon stated that they were satisfied, if that was the theory of plaintiff's case, and would not object to the testimony.' To the theory thus announced appellee must be held. *Louisville, etc., R. Co. v. Renicker*, 8 Ind. App. 404; *Cleveland, etc., R. Co. v. Duggan*, 18 Ind. App. 435, and authorities there cited. It follows that the question presented is, does the evidence show a permanent nuisance?

"Where the injury is of a permanent character, that is, one that can not be discontinued, there is a permanent injury. If the evidence fails to show a permanent injury, the theory of the complaint is not supported, and the verdict must be contrary to law. *Louisville, etc., R. Co. v. Renicker*, *supra*; *Equitable Ins. Co. v. Stout*, 135 Ind. 444.

"The pond in question was not constructed by appellant. The evidence does not show that the pond itself constituted a nuisance. The injury was caused by throwing filth into the water. The question is not here presented whether upon proper complaint appellee could recover damages for injuries during the existence of the nuisance and up to the time of the commencement of the action, but whether she can recover upon proof of temporary injury. A nuisance which may be discontinued is not a permanent one."

The circumstances shown in that case are not such as those shown here. In that case, it was said that the evidence of injury was that the injury was caused by throwing filth into the water of a pond; that the question was not there presented whether, upon proper proofs, appellee could recover damages for injuries during the existence of a nuisance and up to the time of the commencement of the action, but whether she could recover permanent damage upon proof of temporary injury. A nuisance which may be discontinued is not a permanent one. It is obvious in the present case that the

proof proceeded upon the exact theory which the court in that case stated it did not, and it was evident in that case that the nuisance was one which might easily be discontinued at any time and was, therefore, not a permanent one.

In the instant case, we think it was incumbent upon the appellant to show, if it desired, that it was its intention to discontinue the nuisance complained of, in case it should be determined a nuisance; and that, if it did not so show, it must be assumed to be a permanent nuisance as to the respondents. But it must also be held and determined that respondents are now estopped to claim in any form of action any other or additional permanent relief against the operation of appellant's plant. Respondents were entitled to recover permanent actual damages occasioned by the creation and operation of a permanent, existing nuisance in one action. All questions of damage are settled. We do not consider, therefore, that the instruction numbered eleven given by the court was prejudicial, but think that it properly defined the respective rights of respondents and appellant, and submitted the same to the jury for consideration as to the facts.

There was evidence tending to support the recovery of a very substantial sum on the theory of permanent injury to the freehold and permanent depreciation of its value, and the verdict of the jury is supported by such evidence.

Judgment affirmed.

BAUSMAN, PARKER, and MAIN, JJ., concur.

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[No. 12941. Department Two. January 15, 1916.]

WILLIAM PAUL, *Appellant*, v. THE CITY OF VANCOUVER,
Respondent.¹

ASSIGNMENTS — EQUITABLE ASSIGNMENTS — SET-OFF AND COUNTER-CLAIM—ASSIGNED CLAIMS. Where plaintiff undertook to complete a defaulted contract for a public improvement, and to pay all claims against the defaulting contractor, the city, upon paying such claims, becomes the owner thereof by equitable assignment, subject to all defenses, and may offset the payments against plaintiff's action for the balance due on the contract, where they were shown to be valid claims and plaintiff was not deprived of any defenses that might be made against them.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered April 9, 1915, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

M. M. Connor and *Geo. O. Davis*, for appellant.

Geo. B. Simpson, for respondent.

PARKER, J.—The plaintiff, William Paul, seeks recovery of the sum of \$500 from the city of Vancouver, which he claims as a balance due him upon a street improvement contract entered into between himself and the city. Trial was had in the superior court, resulting in findings and judgment in favor of the plaintiff for the sum of \$27 only, and awarding costs to the city because of tender by it of that sum to the plaintiff. From this disposition of the cause, the plaintiff has appealed.

In June, 1911, Rector & Daly entered into a contract with the city for the construction of a street improvement. They executed a bond with sureties to secure the faithful performance of the contract. Thereafter this contract was assigned by Rector & Daly to E. Schelling, with the consent of the city, who proceeded as if he were the original contractor.

¹Reported in 154 Pac. 453.

E. Schelling abandoned the contract before full performance thereof, assigned to appellant, William Paul, all sums due under the contract, and left numerous debts incurred in his part performance of the contract unpaid. Thereafter, in September, 1911, appellant entered into a contract with the city, agreeing to complete the construction of the improvement according to the original contract, the city agreeing to pay him therefor all sums due and to become due under the original contract. This new contract between appellant and the city contained, among other stipulations, the following:

"Said second party (appellant) hereby further agrees to pay all just claims against said E. Schelling, which are proven, either by the O. K. of the purchaser or a sworn statement of the claimant. Said unpaid claims to be paid fifty per cent out of the estimate now in the hands of the city clerk as soon as same is turned over to said Wm. Paul and the balance out of the next estimate received."

Appellant executed a bond for the faithful performance of this contract, conditioned as follows:

"The conditions of the above bond are such that whereas the above bounden Wm. Paul, has entered into a contract with the said city, by the terms whereof he undertakes and agrees to take up and complete the unfinished contract of one E. Schelling, assignee of Rector & Daly, for the improvement of Ninth street in said city, and to pay all creditors of the said E. Schelling for debts contracted in the city of Vancouver, Washington.

"Now, therefore, if the said principal shall well and truly perform the said contract and shall pay all claims against the said E. Schelling as above set out and all claims for material and labor used on the said street then this bond shall be null and void, otherwise to remain in full force virtue and effect."

The construction of the improvement was thereafter completed by appellant and accepted by the city, when there remained a balance due thereon from the city to appellant of \$500, subject, as claimed by the city, to deductions on

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account of claims against Schelling filed with and paid by the city, amounting to \$473, leaving a net balance due appellant of \$27 only, which the city tendered to him and which he refused. Thereupon he commenced this action.

Prior to the tender, several of the creditors of E. Schelling had filed with the city their claims duly verified by sworn statement of each claimant, as it was agreed such claims should be proven, by that provision of the contract between appellant and the city, above quoted. This, the city decided, was sufficient to warrant it paying the claims, aggregating \$473, and deducting that sum from the balance of \$500 due appellant upon his contract. The city set up these claims and the payment thereof by it as an affirmative defense, claiming its right and duty to so pay the claims under the terms of the contract, and claiming to be the owner of the claims as against appellant.

The testimony given upon the trial, aside from the sworn statement of each claimant attached to the several claims, we think leads to the conclusion that they are all valid claims of indebtedness incurred by E. Schelling in his part performance of the contract, and that they are such claims as appellant agreed to pay by the terms of his contract and bond, above quoted. Appellant was heard in the trial of this case upon the merits of these claims as fully as if he were being sued thereon by the claimants themselves. His defense thereto was not impaired in the least by the fact that the city was asserting its ownership of and the justness of the claims as against appellant in its affirmative defense to his claim of balance due upon his contract.

It is contended by counsel for appellant that the city had no right under the contract with appellant to pay the claims, and that it could acquire no right as against him by so doing. It is possible that a technical construction of the contract between appellant and the city would not call for payment of the claims by the city; but that does not argue, as we view

the situation, that the city may not have become the owner of the claims by equitable assignment.

We are inclined to agree with counsel's contention in so far that the city could not, by merely paying these verified claims, impair in the least any defense that appellant might have to any of them. They, of course, were not negotiable in the sense that defenses thereto could be cut off by assignment, however innocent the assignee might be. We have noticed that appellant was not deprived of any defense he might have to any of the claims. We think the circumstances were such that the city became the owner of all the claims by equitable assignment in any event, and that, as such owner, it had the right to set them up by way of affirmative defense, but that it took the chances of being able to prove them to be valid claims, and also the chance of any defense appellant might have against any of them as against E. Schelling, the same as any assignee thereof would have to take. Since appellant was not deprived of any defense he might have against any of the claims, we are unable to see that he has any cause to complain of the fact that he was called upon to defend against them in the hands of the city instead of in the hands of the original claimants. We think the city was not a mere volunteer, in view of its interest in the contract calling for the payment of the claims, in the sense that it could not be regarded as the equitable owner of the claims.

As to the merits of the claims, we conclude that the evidence was sufficient to establish them as valid claims, for the payment of which appellant was liable under his contract and bond to the original claimants. Being so liable, he is now liable to the city, the present owner of the claims.

The judgment is affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

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Statement of Case.

[No. 12612. Department Two. January 19, 1916.]

ANGELES BREWING & MALTING COMPANY *et al.*, Respondents,
v. H. CARTER *et al.*, Appellants.¹

APPEAL — REVIEW — FINDINGS. Findings upon sharply conflicting evidence will not be disturbed on appeal, where it cannot be said that they are not supported by the evidence.

COLLISION—INJURY TO VESSEL—NEGLIGENCE—FAILURE TO OBSERVE LIGHTS—LIABILITY. Where two steamers, the A. and the V. were approaching on opposite courses port to port, so that a third steamer, the C., following astern of the V. with the V. on her starboard bow, must have had an unobstructed view of the A., it was negligence, as a matter of law, for the C. to fail to observe the lights of the A.; and in case the collision was due to such negligence, it would be immaterial which vessel had the right of way.

SAME—NEGLIGENCE—FAILURE TO OBSERVE LIGHTS—FINDINGS AND EVIDENCE. In such a case, a finding of fact to the effect that the C. was first made aware of the proximity of the A., when the A. and V. had exchanged signals to port helms and the V. had swung to starboard, is not necessarily a finding that the A. was not in plain view of the C. prior to that time, so as to escape the imputation of negligence in failing to observe A.'s lights.

SAME—LOSS OF FREIGHT—VALUE—EVIDENCE—SHIPPING INVOICE—ADMISSIBILITY. Upon an issue as to the value of freight lost in a collision of steamers, duplicate invoices furnished by shippers to adjusters of the cargo are competent evidence of value, in the absence of evidence that the shippers' claims were fraudulent or in excess of the actual value of the goods lost and the amounts paid on that account.

SAME—LOSS OF FREIGHT—REIMBURSEMENT—INTEREST. In an action for damages from a collision, an award to reimburse the plaintiff for money paid out to shippers for freight lost should draw interest only from the time of the payments.

Appeal from a judgment of the superior court for King county, Vivian M. Carkeek, judge *pro tempore*, entered June 3, 1914, upon findings in favor of the plaintiffs, in an action in tort, tried to the court. Modified.

Bronson, Robinson & Jones, for appellants.

A. W. Buddress, for respondents.

¹Reported in 154 Pac. 601.

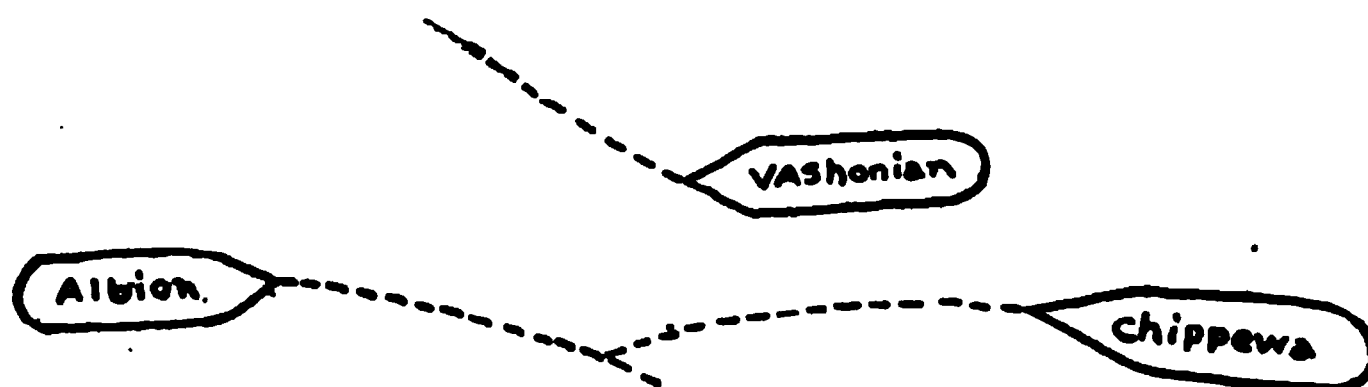
MORRIS, C. J.—This is an action by the Angeles Brewing and Malting Company and its receiver, owners of the steamer Albion, to recover damages for injury incurred by that vessel in a collision with the steamer Chippewa off West Point, near Seattle. From a judgment in favor of the plaintiffs, the defendants have appealed. The facts as to the collision are well stated by the trial court in his opinion, which we adopt, italicizing those portions over which the parties are in dispute. The accompanying diagram, although somewhat exaggerated and not drawn to scale, will also assist in an understanding of the situation.

The steamer Albion left Seattle at about 10:30 o'clock on the evening of August 2, 1910, bound for Port Angeles. The same evening, the steamers Vashonian and Chippewa were coming to Seattle from down the Sound. After turning Four Mile rock, the Albion was steering a course of north northwest; the steamer Vashonian was approaching the Albion and steering a course of south southeast, and the Chippewa was approaching the Albion and steering a course of south by east, and was therefore on a course that was nearly parallel with the Vashonian, but the Chippewa was considerably astern. All the vessels had the regulation lights and the lights were properly burning. When the Albion turned Four Mile rock, the cabin lights of both the Chippewa and Vashonian were visible to her. The vessels mentioned continued to approach each other upon opposite courses until the Vashonian was ahead and *to the port of the Albion*, approaching the Albion, and when at a distance of some five hundred feet, the Albion blew one whistle and ported her helm three-quarters of a point. The Vashonian answered with one whistle and ported her helm three points. This gave her a heavy swing to the starboard and enabled both boats to pass each other with safety. At this moment the Chippewa, which had been coming astern and had about overtaken the Vashonian on her port quarter, blew two whistles as a signal to the Vashonian that it was the intention of the Chippewa to

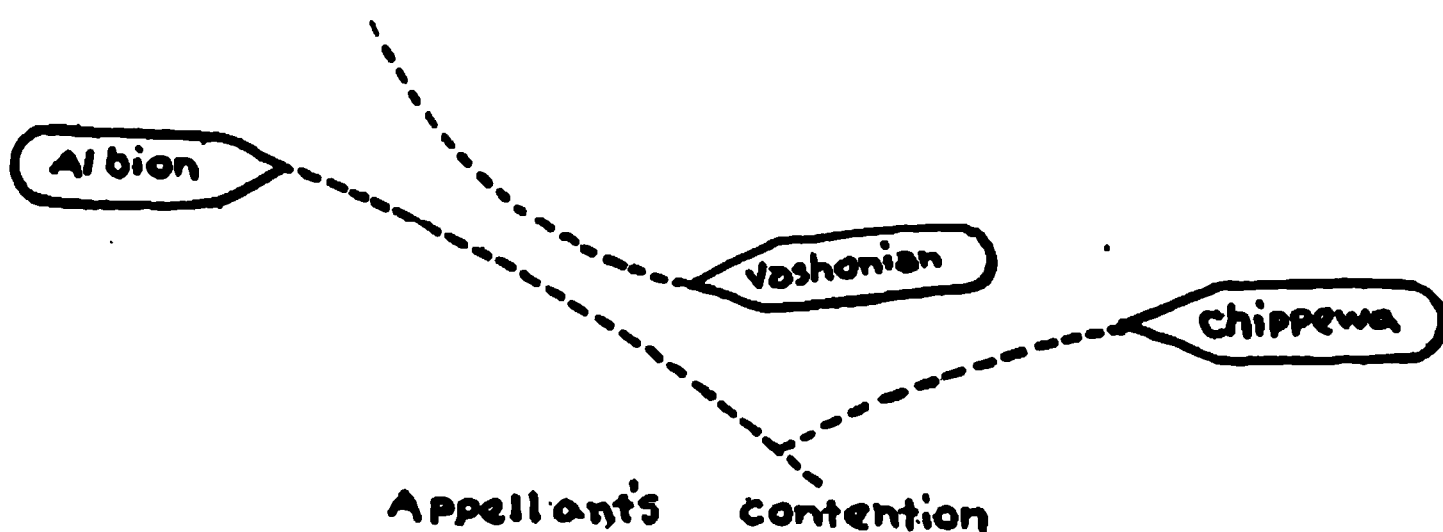
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pass to the Vashonian's port, and, immediately on blowing the two whistles, the captain of the Chippewa starboarded her helm three-quarters of a point. Up to this time the Chippewa had not seen the Albion, but *was first aware of the proximity of the Albion by her red or port light coming into view as the Vashonian swung three points to the starboard.* After blowing the one whistle and then hearing the Chippewa's two whistles, known to pilots as a cross-signal, the Albion blew four whistles, the danger signal, and stopped and reversed her engines. After she stopped and reversed, she reversed a second time and stopped. The Chippewa, realizing that a collision was imminent, began to port her helm in an effort to pass astern of the Albion and between the Vashonian and the Albion, and in doing so, struck the Albion about amidships, inflicting the injuries which the plaintiffs complain of and for which they seek to recover from the defendants.



Respondent's Contention
Situation found by trial court.



The crucial point of dispute in the case concerns the position of the Albion and the Vashonian just before the collision.

The trial court found that the two vessels approached port to port, which is the respondents' contention. The appellants, however, contend that the Albion was on the starboard bow of the Vashonian, which would make the approach starboard to starboard. If this is true, then the Vashonian was directly between the Albion and the Chippewa, and the former was not visible to the latter unless she could be seen over the upper works of the Vashonian. If, however, the Vashonian was to the port of the Albion, as found by the trial court, then the Vashonian being on the starboard of the Chippewa, which is undisputed, the Chippewa had an unobstructed view of the Albion, and failure to see her could be attributed only to the negligence of the Chippewa. The witnesses do not agree on this point. Those on the Albion at the time testified positively that the Vashonian was on her port bow, while Mr. Jackson, master of the Vashonian, testified that the Albion was on his starboard and crossed his bow. The evidence was sharply conflicting, but we are not prepared to say that the facts as found by the trial court are not supported by a preponderance of the evidence.

The appellants, however, contend that the findings as to the facts of the collision, which are practically a copy of the opinion, are inconsistent and do not support the conclusion that the Albion's lights were not obscured from the Chippewa and could have been observed by the exercise of reasonable diligence on her part. These claimed inconsistencies are stated as follows: If the Albion's lights came into view from behind the Vashonian so as to become visible to the Chippewa, as found by the court, then the Vashonian, being on the Chippewa's starboard bow, it necessarily follows that the Albion was also on the Chippewa's starboard bow, contrary to the finding that she was on the port bow. Also, if the Vashonian ported her helm and took a heavy swing to starboard to pass the Albion, it necessarily follows that the Albion was not on the port side of the Vashonian. On the other hand, if the Albion was on the port side of the Vashonian and

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ported her helm sufficiently to swing her three-quarters of a point to starboard, and if at that time she was, as is claimed, dead ahead of the Chippewa, which was passing distance to the port of the Vashonian, there was then no necessity for the Vashonian to make any swing to starboard. The trial court, however, adds that the Albion did not change her course to pass the Vashonian. But though this may be so, it is also apparent from the finding that the Vashonian had to swing 83 degrees around the circle to pass to port of the Albion, which means that they were approaching starboard to starboard. The court further found that the Albion was approaching the Vashonian and the Chippewa, both port to port, and that the Albion at all times had the right of way. Such a finding as to right of way can only be made upon the assumption that the Albion was crossing the courses of the Vashonian and the Chippewa, having them upon her port side.

Although these findings may appear at first to be inconsistent, upon closer examination we do not find that they are irreconcilable with the previous findings. None of them are the bases for the finding that the Albion was on the port bow of the Vashonian, on which the finding of negligence must rest. The finding that the Chippewa was first made aware of the proximity of the Albion when the Vashonian swung to starboard is not necessarily a finding that the Albion was not in plain view of the Chippewa prior to that time, nor is the finding that the Vashonian swung three points to starboard conclusive proof that such a maneuver was necessary to enable her to pass the Albion in safety. The determination of which vessel had the right of way is unnecessary to a finding that the collision was due to negligence on the part of the Chippewa; since it is admitted that, when the Chippewa and the Albion discovered that there was a misunderstanding of intention, both vessels displayed proper seamanship, and that finding does not militate against the essential finding that the Albion was on the port bow of the Vashonian.

Construing the findings as a whole, we fail to see wherein they are defective.

Appellants apparently find no fault in the rule of law applied by the trial court. That, under the facts as found by the trial court, the failure by the Chippewa to observe the lights of the Albion constitutes negligence, as a matter of law, is fully supported by the cases relied upon. *The Gazelle*, 88 Fed. 301; *The New York*, 175 U. S. 187; *Brigham v. Luckenbach*, 140 Fed. 322.

Appellants, however, except to that portion of the judgment which was allowed as compensation for freight damaged in the collision, for the reason that the allowance made was the price of the freight lost as shown by the duplicate invoices furnished by the various shippers in response to a request sent out by the adjusters of the cargo. These invoices were admitted over objection that they did not show the value of the goods lost; but in the absence of some showing that the shippers' claims were fraudulently made or that the prices were in excess of the actual value, the invoices were competent evidence of the actual value of the goods lost and the amount paid by the respondents on that account.

Objection is made to the allowance of interest from October 2, 1910, the date on which the repairs on the Albion had been completed and she was returned to her run. The finding on which the judgment for interest was given is as follows: "All of the repairs, refitting, refurnishing, and adjustments occasioned by the collision were made by and the boat returned to her run on October 2, 1910, and this is an average date from which to compute interest." The damages allowed by the trial court were based on the amounts paid out by the respondents in repairing and refitting the boat and in paying the claims for lost and damaged freight. These amounts could be determined by computation, and interest should be allowed from the date when a right to reimbursement arose. But as the award was to reimburse the respondents for money paid out, interest should not be al-

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lowed prior to the date of the original payment, as respondents had the use of the money until that time. The record does not disclose when the various payments were made, and we are unable to determine what would be a proper allowance of interest. Exhibit "I" is a bunch of vouchers for disbursements made on account of freight lost. The first of these vouchers shows payments of \$1,648.76, but no dates on which the claims were paid are given. Mr. Janecke, receiver of the brewing company, testified that it was probably a year and a half (evidently from the date of the collision) before these claims were paid in full. Other vouchers show payments between November 8, 1910, and September 28, 1911. Exhibit "J," which consisted of vouchers for payments made for repairs, is not before us, and we find no testimony as to when these items were paid.

The judgment will therefore be reversed, and the cause remanded with directions to the trial court to allow interest on the various amounts paid out by the respondents on which a recovery was allowed, from the dates of their several payments.

FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 12743. Department Two. January 19, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Angeles
Brewing & Malting Company et al., Plaintiff*, v. THE
SUPERIOR COURT FOR KING COUNTY, *Vivian M.
Carkeek, Judge Pro Tempore, et al.,
Respondents.*¹

APPEAL—DECISIONS APPEALABLE — AFFECTING SUBSTANTIAL RIGHTS
—ATTORNEY'S LIEN—REFUSING TO STRIKE. The denial of a motion
to strike an attorney's lien upon the judgment, because the present
was not the proper time to test the validity of the lien, does not affect
any substantial right and is not appealable.

CERTIORARI—WHEN LIES—PROCEEDINGS ANCILLARY TO APPEAL—AT-
TORNEY'S LIEN—STRIKING. The denial of a motion to strike an at-
torney's lien upon the judgment, pending appeal, for the reason that
its validity could not be determined by such motion, being a pro-
ceeding ancillary to a case pending on appeal in the supreme court,
is subject to review by writ of certiorari.

ATTORNEY AND CLIENT—LIEN—VALIDITY—DETERMINATION — POWER
OF COURT. The statute being silent as to the procedure to enforce an
attorney's lien upon a judgment, the court may determine the matter
in some form of proceeding if the parties are properly brought be-
fore it.

SAME—LIEN—VALIDITY—DETERMINATION—PROCEDURE — MOTION TO
STRIKE—NECESSARY PARTIES. The validity of an attorney's lien upon
a judgment cannot be tested by plaintiff's motion to strike the lien,
where the judgment subrogated to the rights of the plaintiff two
insurance companies to the extent of a specific sum, and they were
not made parties to the proceeding although affected by the lien, and
other interested parties were compelled to come before the court on
six days' notice, ignoring the statutory notice for litigants; since
the motion was an independent proceeding requiring the presence of
all interested parties.

Application filed in the supreme court April 5, 1915, for
a writ of certiorari to review an order of the superior court
for King county, Vivian M. Carkeek, judge *pro tempore*,

¹Reported in 154 Pac. 603.

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denying a motion to strike a lien for attorney's fees. Denied.

A. W. Buddress, for relators.

Edward Judd, for respondents.

MORRIS, C. J.—This is an original application for a writ to review an order of the superior court for King county, Vivian M. Carkeek, judge *pro tempore*, denying a motion to strike an attorney's lien filed against the judgment in *Angeles Brewing & Malting Co. v. Carter*, ante p. 335, 154 Pac. 601.

Subsequent to the rendition of the judgment in that case, the superior court of Clallam county entered an order removing J. F. Janecke as receiver of the Brewing Company, and appointing G. M. Lauridsen in his stead. Lauridsen thereupon retained A. W. Buddress as his attorney, and an order was entered substituting Lauridsen as plaintiff in place of Janecke, and Buddress as attorney for the plaintiff. Thereafter Willett & Olson, who had represented the receiver in the *Carter* case, filed in that case a notice of attorney's lien in which they claimed a lien for \$4,000 on the judgment therein, for their services in obtaining the judgment. Relator Lauridsen thereupon filed a motion to strike the lien, the substance of which is as follows:

"Now come the plaintiffs in this cause and move this honorable court to strike from the records and files in the above entitled cause the purported 'Notice of Claim of Lien' and the purported Claim of Lien, dated August 14, and filed August 15, 1914, in said cause, whereby O. L. Willett and Frank Olson, doing business under the firm name of Willett and Olson, as attorneys in the city of Seattle, state of Washington, wrongfully claim a lien upon the judgment rendered in the before entitled cause in favor of the plaintiffs and against the defendant, H. Carter, Inland Navigation Company, a corporation, and the Puget Sound Day Line, a corporation; this motion is based on the records and files in said cause, and on the ground that said Willett & Olson have

not, nor either of them, any lien upon nor claim to said judgment; that said purported claim of lien was made and filed after the said Willett & Olson withdrew from said cause and A. W. Buddress was substituted in their place and stead as the attorney for the plaintiffs; that no such lien is given nor authorized by law; and that said Willett & Olson are barred from claiming any such lien by reason of the fact that they elected to hold one J. F. Janecke individually only for the total amount of all of their alleged demands, including the amount included in said claim of lien, by commencing suit in said superior court against said J. F. Janecke, individually, therefor and obtaining judgment against him for the same in cause number 108,619 in said court. That said claim of lien was made and filed without any leave of court appointing said receiver, or any other court."

The trial court overruled the motion to strike, for the reason, "that the present is not the proper time to take any such action. No attempt is being made to foreclose the lien and, from an examination of the records and the decisions, I am of the opinion that the motion is not well taken."

Relator now seeks by certiorari to review this decision. Respondents Willett & Olson appeared, demurred to the petition for want of facts, and also answered.

It is apparent from the views expressed by the trial judge that he did not in any manner pass upon the validity of the lien, nor upon the right of Willett and Olson to file a lien upon the judgment obtained by them in the *Carter* case; and, as no substantial rights of the parties were affected, an appeal would not lie from the order; but since the trial judge did adjudicate that the validity of this lien could not be determined by a motion to strike the lien, and as the motion to strike was a proceeding ancillary to the *Carter* case, which was at that time pending in this court on appeal, certiorari is the proper procedure to review the ruling. Relator argues entirely in his brief that the lien is void; but as the decision of the trial court touched only the manner of procedure to remove the lien and not its validity, the only question before

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us is one of procedure, unless we decide that the action taken was the proper procedure to test the validity of the lien.

The statute, Rem. & Bal. Code, § 136 (P. C. 25 § 33), which authorizes an attorney's lien on a judgment, makes no provision for the procedure to be followed in enforcing the lien nor of any procedure that would destroy it. There can be no question but that, as between the parties to the action in which the judgment was entered, the court has a right to determine all questions affecting the judgment raised by parties properly before the court, in some form of proceeding by which the matters might be properly adjudicated. Our inquiry, then, must be whether the court had before it, upon the motion to strike, all the parties who would be affected by the action of the court in declaring the lien valid or in declaring it invalid and striking it. It is not necessary to decide whether the motion to strike would be the proper procedure, if the validity of the lien were determinable from the record before the court, and we express no opinion upon that question, as we find that all the parties interested in the notice were not properly before the court, and that the validity and reasonableness of the lien could not be determined by the procedure adopted by the relator. The judgment in *Angeles Brewing & Malting Co. v. Carter* subrogated the Pacific Marine Insurance Company and the China Traders Insurance Company "to the rights of the plaintiffs in the sum of \$1,809.20 of the judgment, found in favor of the plaintiffs," by reason of their position as insurers of the hull of the *Albion*. Neither of these companies, both of whom were affected by the lien, was made a party to the proceeding in which the lien and the motion to strike were filed, and this is an attempt on the part of relator to litigate the validity of the lien by a proceeding in which all interested parties were not before the court; and as to those served, the statutory notice provided for litigants was ignored, and they were compelled to come before the court on six days' notice and have their claim determined in a proceeding in which no evidence could

be taken to determine the right of respondents to the lien. Such procedure finds no support in law. As between parties to the suit, the court has the right to determine all issues raised by the pleadings; but the filing of the lien and the motion to strike involved an independent transaction between the new receiver and the former receiver's attorneys, who are not in court except through the motion to strike, and between the insurance companies, which are not before the court at all in this proceeding. The lien and the motion concerned a question of debt for services rendered. If the respondents saw fit they could, after filing the lien, bring an action to foreclose and have the right to the lien and its reasonableness determined in any proper forum. The validity of such a lien, and the legality and justice of the claim, are questions which cannot in this instance be determined by a summary proceeding to strike. The lien here was filed in conformity with the statute granting it, and if the court should deprive the lien claimants of this lien, or declare it reasonable as to parties against whom it might be enforced, in an action in which they were not properly before the court, it would be acting without authority of law and depriving litigants of rights granted them by law.

We are, therefore, of the opinion that the ruling of the trial court was correct, and the demurrer to the petition for the writ of certiorari is sustained. It is so ordered.

FULLERTON, ELLIS, and MAIN, JJ., concur.

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[No. 12694. Department Two. January 20, 1916.]

C. AUWARTER, Respondent, v. WILLIAM KROLL, Appellant.¹

PRINCIPAL AND AGENT—EVIDENCE—DECLARATION OF AGENT—ADMIS-
SIBILITY. While the fact of agency cannot be proved by the acts and
declarations of the alleged agent, the same are admissible, if there
is independent evidence of the agency, to show whether an alleged
contract was in fact made by the agent, holding himself out as such.

APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to permit
a witness to state who was the owner of stock purchased is not
prejudicial where he detailed the circumstances from which the jury
could draw the conclusion as to ownership.

PRINCIPAL AND AGENT—POWERS OF AGENT—POWER OF ATTORNEY.
The authority of an agent holding a general power of attorney which
was recorded, cannot be limited, as to persons dealing with him with-
out notice, by showing that the property dealt with was after-acquired
property, that the agent had been instructed not to acquire it, or to
show the circumstances under which the power was executed, as
strangers had a right to rely on it.

TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS. An instruction
to the jury to the effect that if, under the evidence and these in-
structions, your verdict is for the plaintiff, your verdict will be for
the amounts prayed for in the two causes of action, etc., specifying
the amount of each, and if in favor of the defendant, it will be simply
for the defendant, is not misleading in that it prevented separate
findings on each cause of action, where the issues had been clearly
stated.

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence,
supported by substantial evidence, is conclusive on appeal.

Appeal from a judgment of the superior court for Spo-
kane county, Webster, J., entered December 7, 1914, upon
the verdict of a jury rendered in favor of the plaintiff, in an
action on contract. Affirmed.

Cannon & Ferris and D. W. Henley, for appellant.

Voorhees & Canfield, for respondent.

FULLERTON, J.—The respondent, plaintiff below, brought
this action against the appellant, setting up three causes of

¹Reported in 154 Pac. 438.

action; the first upon a promise to pay a sum certain in consideration of the transfer of a certificate of sale of the property of a mining corporation; the second, for a balance due on an account for labor and services performed by the respondent for the appellant between July 21, 1908, and September 30, 1909; and the third, for labor and services performed by the respondent for the appellant between September 30, 1909, and September 30, 1910. After issue had been joined on the complaint, a trial was had before a jury, which returned a special verdict on each cause of action, finding for the respondent on each of them. The trial court entered judgment on the verdict in favor of the respondent on the first cause of action, and judgment notwithstanding the verdict for the appellant on the second and third causes of action. Both parties appealed from the judgment as entered, and this court affirmed it as to the first cause of action, and reversed and remanded it for a new trial as to the second and third causes of action. *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326. After the cause was remanded, it was tried as to the second and third causes of action, resulting in a verdict and judgment in favor of the respondent for the sums demanded. This appeal is from the last mentioned judgment.

The assignments of error first to be noticed relate to the admission of evidence. To an understanding of the questions involved, a brief review of the facts is necessary. In 1907, a corporation, known as Silver Lead Mining Company, owned certain mining claims, a mill, certain mill machinery, appliances, tools and other personal property, all situate in this state. In July of the year named, Arthur H. Kroll, a son of the appellant, purchased some five thousand shares of the treasury stock of the mining company, paying \$500 therefor. In November of the same year, he contracted to purchase some ninety-five thousand additional shares, agreeing to pay therefor \$9,500 at such times as the corporation might need the money in the prosecution of its mining enterprises.

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Later on, the contract was consummated, Kroll borrowing from his father \$5,000 of the money necessary for that purpose. After the purchase of the stock, Arthur H. Kroll was elected secretary of the company. The mining company was then largely indebted, some \$12,500 of which was secured by mortgages on the company's property. These mortgages were taken up by the appellant in February, 1908, and about this time, perhaps a little later, the appellant advanced some \$3,000 more for the use of the company, taking a combined chattel and real mortgage on the property of the company as security therefor. At about this time, also, the power of attorney quoted in the opinion in the case on the prior appeal was executed.

The respondent first met Arthur Kroll in March, 1908. The respondent was looking for an investment for some idle money that he then had, and, meeting Kroll, was induced to invest it in the corporation stock. As a part consideration for the purchase, he was given the option to withdraw his money, with interest at ten per centum, at any time within one year thereafter, in case he should, within that period, become dissatisfied with the investment. As a further part consideration for the contract of purchase, he was promised work at the mine, and immediately thereafter, on March 28 or 29, 1908, he went to the mine and worked therein for the corporation until July 17, 1908, when the mine was closed for want of funds to operate it. At this time the Krolls, father and son, had a large sum invested in the mine, in part in its capital stock, and in part for money loaned it and advanced to its use. There was also owing at that time by the corporation considerable sums to laborers, among whom was the respondent, whose claims were lienable against the corporation's property, and a number of such liens were filed, including one by the respondent. These liens were purchased by Arthur Kroll and assignments thereof taken from the several claimants.

Shortly after procuring the assignments for these labor claims, Arthur H. Kroll began an action thereon in his own name to foreclose the same. Included in the action were other large sums which the mining company was obligated to pay him, and which were likewise a lien upon the property of the company. The appellant, William Kroll, at the same time, began actions in foreclosure upon the mortgages held by him. There was also an action begun in the respondent's name to recover upon the contract to refund the money paid by him for corporate stock, he having elected within the year to rescind the contract of purchase. These actions were prosecuted to judgments, the property of the mining company sold thereunder, and, after the time for redemption had expired, namely, August 20, 1910, a sheriff's deed to the property was executed to the appellant, William Kroll.

The services rendered by the respondent which are the subject of controversy in this action were performed at the mines between the time mining operations ceased therein and a time some ten days later than the date on which the appellant received the sheriff's deed to the mining property. There was no question that the services were performed as alleged by the respondent; but the contract of hire was made with Arthur H. Kroll, and the question was whether it was made on his own behalf solely, or on behalf of himself and his father, the appellant. Aside from the facts recited showing the interests of the parties in the mining property, the respondent introduced in evidence the power of attorney executed by the appellant to Arthur H. Kroll, and the statements and declarations of Arthur H. Kroll as to the persons by whom the respondent was employed. These statements and declarations were admitted over the objection of the appellant, and the action of the court in so doing constitutes the first error assigned on this appeal.

If we have correctly gathered the appellant's first contention with regard to the admissibility of the questioned evi-

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dence, it is that the respondent has sought to prove the agency of Arthur H. Kroll by the declarations of the agent himself. If this were the purpose of the evidence, then clearly it was inadmissible, as the rule is universal that the declarations of a supposed agent are inadmissible to prove the fact of agency. But it seems to us that the admissibility of the evidence has a much better foundation. The agency of the younger Kroll, and his power to make such a contract, were sought to be established by independent evidence, first, by the power of attorney, which preceded the contract of employment, and, second, by the fact that he had acted as the representative of his father in all of his father's dealings with the mining property. But the pleadings raised the question, not only as to the fact of agency, but whether or not the alleged contract was in fact made by the agent. On this latter question the evidence was clearly admissible, and such was our holding in *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915 D. 23. In that case we said:

"It is, of course, elementary that the fact of agency cannot be proved by the acts and declarations of the alleged agent without the knowledge of the principal. A review of the authorities cited to that point would be coals to Newcastle. But where, as in this case, there was independent evidence tending to show the fact of agency and that the principal knowingly permitted the agent to hold himself out as manager of its farm lands department and to carry its business cards bearing that legend, then the acts and declarations of the agent were admissible on the issue as to whether in fact he did so hold himself out and did make the contract in question as the contract of the principal. There being other evidence to establish his authority to bind the principal, this evidence was admissible as showing that he in fact attempted to do so. . . .

"Moreover, it has often been held that, if the fact of agency be otherwise *prima facie* established, the acts and declarations of the alleged agent become admissible in corroboration.

"Any declaration of the agent as to his authority would be admissible, when other evidence had been shown from which authority to do the thing may be inferred; or, if the trial

court improperly admitted declarations of the agent, the error would be cured by evidence subsequently introduced from which authority might be inferred, and in case such evidence was introduced the question of authority would become one of fact for the determination of the jury.' *Eagle Iron Co. v. Baugh*, 147 Ala. 618, 41 South. 668.

"See, also, *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321; *Ham v. Brown Bros.*, 2 Ga. App. 71, 58 S. E. 316; *Singer & Talcott Stone Co. v. Hutchinson*, 184 Ill. 169, 56 N. E. 353; 31 Cyc. 1655."

Counsel for the appellant further say:

"The alleged agent could not in any event bind appellant by admissions concerning the question as to whether he was contracting in behalf of himself or in behalf of appellant. He could not bind appellant by any admission of appellant's ownership where the question to be determined was as to whether that particular property was owned by the agent or by his alleged principal. It requires but a casual consideration of the dangers of such testimony to show that it should be rejected. The rule is that one cannot sue an agent where the principal has been disclosed at the time of the transaction involved in the suit, and if the agent's admission to the effect that he represented his principal in transactions where he in fact was representing his own separate interest, were admissible then, he might, under such rule, bind his principal and thereby relieve himself from liability. Such a rule would make it hazardous to appoint agents, and profitable for agents to procure appointments."

But as we read the record, this evidence was not offered to show, nor admitted for the purpose of showing, that the appellant had an interest in the mining property. This was shown by independent evidence, competent under all circumstances. It was shown that the appellant had purchased outstanding mortgages upon the corporation's property, and had made advancements to it, taking a combined chattel and real mortgage on such property as security therefor; that the company had ceased mining operations, and that its property needed protection pending foreclosure proceedings which were then contemplated by the appellant.

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His interest on the property being thus established, and it being shown that the agent had a general power of attorney to contract with reference to the appellant's concerns, the evidence objected to was admissible to show, as we say, that he had contracted in the appellant's behalf with respect to the particular property. In other words, the respondent did not attempt to establish the appellant's interest in the property by the declarations of the agent, but only that the agent had contracted in behalf of his interests in reference thereto. And herein the case differs from the case of *Coldwater Nat. Bank v. Buggie*, 117 Mich. 416, 75 N. W. 1057, principally relied upon by the appellant. In the trial of that case, the declarations of the agent were received to show the interests of the alleged principal, and the court on appeal held the evidence inadmissible for such purpose. Without inquiry into the correctness of the rule announced, we are clear that the question decided is not the question presented here.

Arthur H. Kroll while on the witness stand testified concerning his purchases of stock in the mining corporation, saying in substance (We quote from the abstract):

"I became interested in this Spokane Silver Lead Mining Company about November, 1907. I first became interested in it in a small way in July, 1907, but went into it further in 1907. My July interest was \$500, represented some stock, issued to myself. In November, 1907, I purchased under contract 95,000 shares of stock to be issued and paid for as the company needed the money; we paid \$9,500."

He was then asked the question, "Whose stock was that in fact?" To this question, an objection was interposed, on the ground that it called for a conclusion. The objection was sustained by the trial court, and the ruling is assigned as error. But the witness was permitted to state in detail all of the circumstances concerning the purchases, as well as the subsequent disposition made of the stock. The jury were thus made acquainted with the facts and were competent themselves to draw conclusions as to its ownership. The

error in refusing to permit the witness to answer the particular question, if error at all, was not so far prejudicial as to require a retrial of the action.

Error is also predicated on the ruling of the court refusing the appellant's offer to testify that, at the time the power of attorney given to the son was executed, he had no interest in the mining property; in refusing to permit the appellant to testify to the facts and circumstances in relation to giving the power of attorney; and in refusing to permit the appellant to testify that he had forbidden his son to enter into the contract in question. But we think the evidence was properly rejected on the ground of immateriality. Whether the appellant owned an interest in the mining property at the time the power of attorney was entered into could not affect the agent's right to contract with reference thereto in the appellant's behalf after the appellant had acquired such an interest. The power was general; it related to all business of the appellant, and was as applicable to after acquired interests as those existing at the time it was executed. One dealing with the agent with reference to particular property on the strength of the power of attorney could not be affected by the circumstance that the principal acquired his interest in the property subsequent to the time the power of attorney was executed. Indeed, he would rather have the right to suppose that it was executed in anticipation of a subsequent acquisition of such interests. So with the circumstances surrounding the execution of the power of attorney. The effect of such evidence could be only to limit the agent's authority thereunder, and the agent's authority, as between the agent and a stranger thereto, must be determined by the contents of the instrument itself; it cannot be affected by extraneous agreements. The ruling of the court rejecting the offer of the appellant to show that he had forbidden his son to make the contract in question with the respondent, is justified on the principle that a principal cannot limit his agent's general authority by secret instruction. The power

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of attorney was recorded. To this the respondent had access, but he could not know of instructions limiting the general authority contained in the recorded power, not communicated to him, and no evidence was offered to show that they were so communicated.

Among the instructions given by the court are the following:

“If, under the evidence and these instructions, your verdict is in favor of the plaintiff, your verdict will be for the amounts prayed for in the two causes of action, to-wit, the sum of three hundred and fifty dollars, with interest thereon at the rate of six per cent per annum, from the 30th day of September, 1909, on the first cause of action; and the sum of twelve hundred dollars with interest thereon at the rate of six per cent per annum from the 30th day of September, 1910, on the second cause of action. If, upon the other hand, your verdict is in favor of the defendant, your verdict will be simply for the defendant.”

It is objected that these instructions did not permit the jury to find separately upon each cause of action, but required them, if they found either cause of action proven, to return a verdict in favor of the plaintiff regardless of what might be their opinion on the other, and it is argued that there was evidence in the record which might induce the jury to find in favor of the plaintiff on the last cause of action stated which was inapplicable to the other. If there had been no other instructions concerning the issues involved, we think it may be questioned whether the instruction bears the interpretation the appellant puts upon them. The instructions, however, as a whole were not misleading. There was, it is true, no specific instruction on the particular point; but the issues were clearly stated to the jury, and they were told that they must find for the appellant unless they found, by a preponderance of the evidence, that the agent did in fact make the contracts with the respondent as the agent of, and for and on behalf of, the appellant, William Kroll. Indeed, it seems to us, as the respondent argues, that the instructions

were more objectionable from his point of view than from the point of the appellant, but we are not constrained to adopt either theory. We think the jury were in no way misled.

Lastly, it is contended that the evidence was insufficient to justify the verdict. We think, however, it would not profit to enter upon a further review of the evidence. Upon all of the controverted issues there was substantial evidence in support of the respondent's contention. The jury's findings thereon are therefore conclusive.

The judgment is affirmed.

MORRIS, C. J., MAIN, and ELLIS, JJ., concur.

[No. 12787. Department Two. January 20, 1916.]

CHARLES ROCKWOOD, *Appellant*, v. H. H. TURNER,
Respondent.¹

APPEAL—RECORD—ABSTRACT. Motions to strike the abstract of record and briefs and to dismiss for failure to refer to the pages of the statement will be overruled where the statement comprises but thirty-seven pages, and because of its brevity an abstract was not necessary and no prejudice resulted.

APPEAL—RIGHT TO APPEAL—ESTOPPEL—CORRECTION OF JUDGMENT. The fact that appellant obtained a correction of the judgment in one particular which was admittedly wrong and the fault of the respondent, does not work an estoppel to appeal from the corrected judgment.

TRIAL—OBJECTIONS—WAIVER. Where, to show title, the records of the county auditor's office were offered in evidence showing a deed, and the same was read into the record, without objection other than objection to any description of additional property not in controversy, and appellant waived cross-examination, he thereby waived strict documentary evidence as shown by the deed record.

TAXATION—CERTIFICATE OF DELINQUENCY—FORECLOSURE—NOTICE—NAME OF OWNER—STATUTES. Under Rem. & Bal. Code, § 9254, providing for notice of the foreclosure of a certificate of delinquency to the "owner of the property described in the certificate" and Id., § 9257, providing that the name of the person appearing on the tax

¹Reported in 154 Pac. 465.

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rolls as the owner shall be considered as the owner of the property, upon the foreclosure of a certificate for the year 1908, when R. appeared on the assessment roll as the owner, he is the only person that need be named in the notice for publication, although the certificate of delinquency did not issue until one year thereafter, at which time M. appeared on the rolls as the owner, the unpaid taxes for 1909 and subsequent years having been paid.

SAME—FORECLOSURE—SUMMONS BY PUBLICATION—PROOF—SUFFICIENCY. Proof of publication of the summons in a tax foreclosure made by the "cashier" of a newspaper is insufficient to confer jurisdiction to enter judgment, in view of Rem. & Bal. Code, § 237, subd. 3, requiring such proof to be made by the affidavit of the "printer, publisher, foreman, principal clerk or business manager of the newspaper."

TAXATION—FORECLOSURE—JUDGMENT—RECITALS AS TO SERVICE—CONCLUSIVENESS. A recital in a tax foreclosure judgment of due service of summons is not conclusive and it will not be presumed that due service was made, where the record shows affirmatively that it was based upon a service by publication which was not proven in the manner required by law.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered September 17, 1914, in favor of the defendant, in an action to vacate a tax deed and to quiet title, tried to the court. Reversed.

Cannon & Ferris and Peacock & Ludden, for appellant.

Cordiner & Cordiner, for respondent.

HOLCOMB, J.—The appellant in this action attacks the validity of a tax judgment and tax sale upon two grounds: First, because notice of foreclosure of the delinquency certificate was not served upon all persons who appeared upon the roll of the county treasurer as owners of the land for the years 1908 and 1909; and second, because the proof of service of the published summons is defective.

I. Respondent first moves to strike certain parts of appellant's abstract of the record and to dismiss the appeal, and to strike appellant's brief from the record and affirm the judgment. The first of these motions is without merit, for the reason that the statement of facts in this case comprises

but thirty-seven pages and there is no real necessity for an abstract of such a record. At any rate, the abstract is sufficient without "appropriate references by pages to the transcript or statement of facts," because of the brevity of the statement of facts and transcript. Respondent could not have been in any wise prejudiced or have suffered any hardship by the failure complained of. The same reasoning applies to respondent's motion to strike appellant's brief from the record, and it also is without merit. Both motions are denied.

II. Respondent also contends that appellant is estopped from appealing from the judgment entered by the superior court, for the reason that appellant moved for and obtained an amendment of the judgment that was first entered by the superior court and is, therefore, bound by the amended judgment. It appears that the respondent included in the judgment which was first signed by the court a tract of land which he had no right to include in the judgment, and, upon a showing thereof by appellant, the judgment was amended and corrected to exclude that tract. We have little patience with a contention by counsel based upon a proceeding necessitated by counsel for respondent's own wrong. Of course, appellant invited the amendment, but he had a right to insist that the court should not include any more of his land in a judgment in an action to quiet title against a tax foreclosure proceeding than was involved therein. Upon the showing made therefor, if the trial court had not in all fairness corrected the judgment as it did, it would have been a gross inequity and wrong, and this court would have corrected it if brought properly before us.

III. It is further contended by respondent that appellant did not prove that he had any interest in or to the land involved in this controversy; that the only evidence offered by appellant was parol evidence that he was the owner of the land; that respondent objected and excepted to the introduction of such evidence on the ground that parol evidence is in-

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competent to prove title to real estate. This contention also is not borne out by the record, since the statement of facts and abstract show that appellant offered the record of the county auditor's office of Spokane county showing the record of a deed from one Cushing and wife dated March 31, 1902, recorded in book 123 of deeds, at page 335, and including the land described in this proceeding, as shown by an abstract which he had in court, and read the same into the record; that respondent objected to the description of any other additional property than that described in this proceeding; that respondent made no other objection, but reserved the right to cross-examine plaintiff with the abstract which counsel for plaintiff had just used, and which cross-examination he thereafter waived. He therefore waived the strict documentary evidence as shown by the deed record, and his contention is purely technical.

IV. Upon appellant's first contention, the facts are substantially these: The assessment roll of Spokane county for the year 1908 showed the owner of the lands described in appellant's complaint to be Charles Rockford. During that year, Charles Rockwood was in fact the owner of the tract in question. The tax for that year was not paid. In 1909, the assessment roll showed that one May Mallette was the owner of the property involved. On July 18, 1910, a certificate of delinquency naming Charles Rockwood as owner covering the delinquent tax for 1908 upon the land was issued to one A. J. Cuttell. This certificate was for \$69.05, and included the taxes due on the land for the year 1908, and also, as an easy method of bookkeeping, instead of issuing a separate receipt to the purchaser of the delinquency certificate for the tax on the land for the year 1909, the amount thereof (excepting for an error made by the treasurer) was added to and included in the certificate of delinquency for 1908, thus making the total of the certificate \$69.05. The holder of the certificate continued to pay taxes thereafter until 1913. In July, 1913, the holder of the certificate be-

gan foreclosure proceedings in the superior court of Spokane county and, upon a showing therefor, made or attempted to make service by publication of the summons therein, the summons being directed to "Charles Rockford, et al." On October 17, 1913, the attorney for the certificate holder made a showing for default upon such published summons, the default was granted on October 20, 1913, and on the same day a judgment and decree of foreclosure of the tax delinquency certificate was made and entered by the superior court of Spokane county. An order of sale was issued thereon, and the land was subsequently sold to respondent. Appellant contends that the case is controlled by our decision in *Radcliff v. Hughes*, 82 Wash. 167, 143 Pac. 980. In that case we said:

"Section 9254, Rem. & Bal. Code, . . . provides, that when a certificate of delinquency is foreclosed 'notice to the owner of the property described in such certificate' is necessary. Section 9257, Rem. & Bal. Code, . . . provides that 'The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this chapter shall be considered and treated as the owner or owners of said property. . . .' The respondent claims that the words 'names of the person or persons appearing on the treasurer's rolls as the owner or owners,' means the names so appearing at the time of the commencement of the action to foreclose. . . . This is not now an open question in this state. The view has been announced and adhered to that the names of the person or persons appearing upon the treasurer's rolls as owner or owners means the person or persons appearing as such on the rolls when the certificate is issued and who are described in such certificate as the owner or owners. . . . 'the statute only requires notice to be given to the owner *described in such certificate.*' "

But we think this case is against appellant's contention. It is true that the certificate of delinquency in this case issued in 1910, after the name of May Mallette appeared on the assessment roll as owner of the property; but the certif-

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icate of delinquency was for the tax of 1908, which, under our statute, became delinquent June 1, 1909. Rem. & Bal. Code, § 9219 (P. C. 501 § 175). A certificate of delinquency could not be issued therefor until one year after delinquency. Rem. & Bal. Code, § 9252 (P. C. 501 § 237). The unpaid taxes for 1909 were, however, paid by the holder in 1910 at the time the certificate was issued, and thereafter he paid all the subsequent taxes assessed against the land. This was not, therefore, a foreclosure of a certificate of delinquency for 1909, but originated upon the delinquent taxes of 1908. The name appearing upon the assessment roll as owner of the land at that time was Charles Rockford. It was not necessary, therefore, under our decisions, to include the name of May Mallette in the summons and foreclosure. See, also, *Preston v. Cox*, 50 Wash. 451, 97 Pac. 493; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Shipley v. Gaffner*, 48 Wash. 169, 93 Pac. 211.

V. The record affirmatively shows that the only summons served in the foreclosure action was served by publication. Subdivision 3 of Rem. & Bal. Code, § 237 (P. C. 81 § 167), provides that proof of service of summons by publication shall be by "the affidavit of the printer, publisher, foreman, principal clerk or business manager of the newspaper," etc. The proof filed in the foreclosure suit is not by either printer, publisher, foreman, principal clerk, or business manager, but is made by a person who describes himself as the cashier of the newspaper. In *Neff v. Pennoyer*, 3 Sawyer 274, the United States Circuit Court for the District of Oregon, per Deady, J., passing upon a similar statute of the state of Oregon, providing for summons by publication and for proof thereof, said:

"Section 69 of the Code of Civil Procedure [of Oregon] requires that the service of the summons shall be proved, in case of publication by the 'affidavit of the printer or his foreman or his principal clerk.' As appears from the affidavit to

the publication it was made by Henry C. Benson, the 'editor' of the paper. The statute is imperative and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. It may be in some cases that the editor has such knowledge also, . . . but if it were so it should have been stated. But as a rule the contrary is probably true. One of the elementary rules of evidence is that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts where the proceeding is *ex parte*. An editor does not know by virtue of his employment as such, that a summons has been published in all the numbers of the paper he edits, put in circulation during a certain period of time. But the printer may be reasonably presumed to. Therefore the editor's affidavit is not the best evidence of the matter. . . . For these very sufficient reasons, as it appears to me, the legislature has required that the service by publication shall be proven by the best evidence of which the case is susceptible—the affidavit of the printer, his foreman or principal clerk. This being so, no court is authorized for any reason to assume that the affidavit of an editor or other person, not the printer of a paper, is legal evidence of a publication therein."

The supreme court of Oregon, with reference to the same statute as that referred to in *Neff v. Pennoyer*, has repeatedly held that, in case of publication, proof by any one other than one of the persons referred to in the statute, viz., the printer or his foreman or his principal clerk, is not sufficient, and that a judgment based thereon is void. *Odell v. Campbell*, 9 Ore. 298; *Rafferty v. Davis*, 54 Ore. 77, 102 Pac. 305; *Osburn v. Maata*, 66 Ore. 558, 135 Pac. 165.

The proposition is similar to a case where a statute should require personal service to be made by a sheriff or his deputy who should make return thereof. If personal service were made by some other officer of a summons otherwise correct in form and if properly served conferring jurisdiction upon the

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court, yet a return made by some other officer or person than the one prescribed by statute would be ineffectual and confer no jurisdiction upon the court.

It is contended, however, by respondent that the recital of the judgment in a foreclosure proceeding imports absolute verity; citing *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118, and *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018. If the record of a court is silent as to a jurisdictional fact for the purpose of upholding the judgment, it will be presumed that the fact was duly made to appear to the court. But when it appears from the record that such fact was made to appear by a certain means, it will not be presumed that it was also made to appear otherwise or by additional means. *Neff v. Pennoyer, supra*.

Here the record shows that the proof of service was by the affidavit of the cashier of the newspaper, and there is no other proof of service, and a motion for default by the attorney for the plaintiff was based upon the affidavit of such cashier and the affidavit of the attorney and upon publication of summons only. The order of default made by the court merely recited that the defendants had been "duly and regularly served with summons and notice herein, as required by law, and that more than sixty days have elapsed since the day of said service, and that said defendants, and each of them, are now in default."

The findings of fact, conclusions of law, and judgment in the foreclosure case merely referred to the order of default, and made no other recital of service. The record affirmatively shows that the service was not proven as required by law. The affidavit of the cashier of the publication of a summons was not the affidavit required by statute, and conferred no jurisdiction upon the court in the foreclosure proceeding based thereon. It was therefore void.

Respondent further contends that, in a cross-complaint which he made in connection with his answer to appellant's amended complaint, he alleged that appellant now is, and for

more than three years prior to the commencement of this action was, a nonresident of the state of Washington, and that respondent, prior to the commencement of this action, was, and now is, the owner in fee simple of the land, and that appellant does not deny these allegations. This contention is not borne out by the record. Appellant admitted in his reply that he is a nonresident of the state of Washington, but denied all the other affirmative allegations in respondent's further affirmative answer and cross-complaint.

The judgment is reversed, and the cause remanded with instructions to enter a decree in favor of appellant, upon his complying with the tender alleged in his amended complaint, quieting title in appellant.

MORRIS, C. J., BAUSMAN, PARKER, and MAIN, JJ., concur.

[No. 12973. Department Two. January 20, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v.

TONY CAVELERO, *Appellant*.¹

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. The statement of the prosecuting attorney that a witness for the state whose name was indorsed on the information was out of the state, and if the truth were known, the accused knows of her whereabouts and why she was not present, is not so prejudicial that it was not cured by the court's immediately instructing the jury to disregard it.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 13, 1915, upon a trial and conviction of giving whiskey to a minor. Affirmed.

Coleman & Fogarty, for appellant.

O. T. Webb and Percy Gardiner, for respondent.

PARKER, J.—The defendant, Tony Cavelero, was convicted in the superior court for Snohomish county of the commis-

¹Reported in 154 Pac. 435.

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sion of a misdemeanor, and has appealed to this court from the judgment rendered against him thereon.

Contention is made in appellant's behalf that his rights were prejudiced upon the trial by remarks made by the prosecuting attorney in his argument to the jury as follows:

"Members of the jury, you will notice that the name of Mabel Pixley is endorsed upon the information as one of the state's witnesses. You will also remember that she was not called as a witness for the reason that she is now out of the state, and, if the truth were known, the defendant knows of her whereabouts and why she was not present at the trial."

The trial judge immediately, at the request of appellant's counsel, instructed the jury to disregard these remarks. We do not by any means commend the making of these remarks in argument by the prosecuting attorney as proper. We do not think, however, that they were so palpably prejudicial to the rights of appellant that the error in making them could not be cured by a proper instruction of the court, timely given, as was done in this case. We think that these remarks constituted no greater impropriety on the part of the prosecuting attorney than those considered by us in *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33, and which we held were not such as to call for a new trial, in view of the court's instruction to the jury to disregard them.

The judgment is affirmed.

MORRIS, C. J., BAUSMAN, HOLCOMB, and MAIN, JJ., concur.

[No. 12847. Department Two. January 20, 1916.]

NORTH AMERICAN LUMBER COMPANY, *Respondent*, v.

THE CITY OF BLAINE *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—INJUNCTION—INTEREST OF PARTIES. A landowner, bringing suit in its own behalf to enjoin the assessment of its tide lands, cannot complain of the assessment of other tide lands in which it has no interest.

SAME—INJUNCTION—ASSESSMENTS — PENDING APPEAL — JURISDICTION. Irregularity in including harbor area, which was not assessable, in an improvement district, does not deprive the city of jurisdiction to proceed with the improvement and assess tide lands that were legally assessable; hence the fact that the lessee of harbor area was seeking an injunction by appeal from a judgment of dismissal, does not deprive the city of jurisdiction *pendente lite* to proceed to assess tide lands owned by plaintiff.

SAME—PUBLIC IMPROVEMENT—ASSESSMENTS—PENDING APPEAL—EFFECT OF REVERSAL—FAILURE TO OBJECT—INJUNCTION—JUDGMENT ON REMAND. Where the lessee of harbor area sought, by appeal from judgment of dismissal, to enjoin an improvement and the assessment of leased harbor area that was not assessable, as well as tide lands owned by it which were assessable, and pending the appeal and while no injunction was in force, the city completed the improvement and levied the assessment upon due notice, upon reversal of the judgment of dismissal and remand with instructions to "enjoin the improvement," the plaintiff may be entitled to judgment on remand cancelling the assessment on the harbor area, as to which the city had no jurisdiction of the subject-matter, upon the theory that the city proceeded *pendente lite* at its peril; but plaintiff is not entitled to a cancellation of the assessment upon its tide lands, as to which the city had jurisdiction to proceed, where plaintiff failed to file timely objections to the assessment roll or give notice of appeal, as required by 3 Rem. & Bal. Code, § 7892-23, providing that confirmation shall be final and conclusive in such case.

SAME—ASSESSMENTS—VALIDITY — SUBSEQUENT STATUTES. The illegal assessment of leased harbor area, which was not at the time assessable, is not validated by the subsequent enactment of Laws 1915, p. 363, providing that all leasehold rights in or to harbor areas in cities and towns are subject to assessment for local improvements.

¹Reported in 154 Pac. 446.

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Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered February 15, 1915, in favor of the plaintiff, vacating an assessment roll and enjoining a public improvement, in compliance with a remittitur of the supreme court. Affirmed in part and reversed in part.

George D. Montfort, for appellants.

Walter B. Whitcomb, for respondent.

PARKER, J.—The plaintiff, North American Lumber Company, commenced this action in the superior court for Whatcom county, seeking to enjoin the city of Blaine and its officers from constructing a local street improvement and levying local special assessments to pay for the same. The trial resulted in denial of the relief prayed for and dismissal of the action by the superior court, from which the plaintiff appealed to this court and secured a reversal of the judgment of the superior court and the remanding of the cause to the superior court “with instructions to enjoin the improvement as proposed.” The decision of this court is reported in 81 Wash. 13, 142 Pac. 438. The cause is again before us upon appeal taken by the city from the judgment entered by the superior court upon the going down of the remittitur, which, it is insisted, is not the proper judgment to be now rendered, in view of the fact that the improvement was fully constructed, the special assessments levied and confirmed, and bonds issued against the special fund so created and delivered to the contractor in payment of the improvement, before the rendering of the decision of this court and while there was no restraining order or injunction in force preventing the city from so proceeding. It will be conducive to clearness to summarize all the controlling facts here, though it will, in a measure, be a repetition of facts appearing in our former decision.

On January 20, 1913, the city council of Blaine declared its intention to improve that portion of E street lying within

the harbor area and the tide lands in the city and to assess the cost thereof against the property benefited thereby, defining the proposed local improvement district, including the property to be assessed. This proposed district included certain portions of the harbor area which the lumber company held under lease from the state, and also certain tide lands owned by the lumber company. On February 17, 1913, after due notice furnishing property owners an opportunity to protest against the making of the proposed improvement, the council duly passed ordinance No. 428, finally providing for the construction of the improvement and for the creation of a local improvement district, including that portion of the harbor area upon which the lumber company held a leasehold interest from the state, and, also, the lumber company's tide lands, with other property to be charged by assessment with the cost of the improvement; and for the issuance of local improvement bonds against the special fund to be created by such assessments to pay for the improvement.

On March 12, 1913, this action was commenced by the lumber company in the superior court for Whatcom county, praying for an injunction restraining the city from proceeding with the proposed improvement and assessments, and for general relief. The lumber company sued as a general taxpayer of the city, as the owner of a leasehold interest in the harbor area to be assessed, and as the owner of certain tide land blocks to be assessed. The lumber company rested its right to an injunction upon the theory that the harbor area was not subject to assessment to pay for local improvements, and that the city could not lawfully make provision for the payment of the deficiency which would be caused by its inability to assess the harbor area, because of the fact that it was indebted far beyond the limit prescribed by the state constitution. Reference to our former decision will show that this is, in substance, the ground upon which it was held that the lumber company was entitled to relief. It will also be noticed that the only instruction to the superior court touch-

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ing the nature of the relief it should grant the lumber company is contained in these concluding words of the decision:

"The judgment is reversed, and the cause remanded with instructions to enjoin the improvement as proposed." *North American Lumber Co. v. Blaine*, 81 Wash. 13, 142 Pac. 438.

When the remittitur went down to the superior court for entry of final judgment in accordance with our decision, both the city and the lumber company brought to the attention of that court, by affidavits, facts occurring since the original trial of the cause in that court, which rendered it plain that whatever relief the lumber company was entitled to by virtue of our decision could not be then effectually granted in the terms of an injunction as originally prayed for, since all of the acts of the city which the lumber company had sought to have enjoined had been fully performed by the city. These new facts, necessary to be here noticed, are the following: Immediately on the judgment of the superior court being rendered in favor of the city, it entered into a contract for the construction of the improvement at a cost of something less than \$12,000, which was the original estimated cost of the improvement. The improvement was completed according to the contract and as originally contemplated by the resolution and ordinance providing therefor. Local improvement bonds against the district were by the city issued and delivered to the contractor in payment of the improvement. An assessment roll was made up in the usual manner, assessing the cost of the improvement against the property within the district, apportioning approximately \$2,000 thereof against the harbor area and \$10,000 thereof against the tide lands within the district. The portion of the harbor area held under lease by the lumber company was assessed \$346.92. The tide lands owned by the lumber company were assessed \$1,796.83. Due notice was given as the law directs, of hearing before the council upon the question of the confirmation of this assessment roll, and no objection being made thereto by any one, the council, by ordinance, duly confirmed the

same. All of this occurred before the rendering of our former decision holding that the lumber company was entitled to relief, and at a time when there was no restraining order or injunction in force against the city from so proceeding.

After the rendering of our former decision, the council, seeing that it was without authority to assess the harbor area, adopted a resolution cancelling all assessments made upon the harbor area and directed the city treasurer to cancel the same upon the assessment roll of the district. These new facts being brought to the attention of the superior court by affidavits filed in behalf of both the city and the lumber company, as to which facts there seems to be no serious dispute, the question was presented to the superior court as to the nature of the judgment it should enter, to the end that the lumber company should have such relief as it was entitled to in the light of our former decision. The matter being thus presented to the superior court, it entered a judgment annulling each and all of the assessments made upon the property within the district, adjudging and decreeing:

“That each and every of the said assessments is cancelled and the defendants, and their successors in office and all persons acting or to act by, through or under them, be and they are hereby perpetually enjoined from enforcing or collecting the said assessments or any part thereof.”

Counsel for the city contends that the lumber company is, in no event, entitled to any greater relief at this time than the cancellation of the assessment upon the harbor area and the prevention of the city's satisfying any deficiency caused by such cancellation by making the same a charge upon its general fund, and that, since all of the assessments upon the harbor area have been voluntarily cancelled by the city and the city disclaims all intention of satisfying the deficiency so resulting by causing the same to be made a charge upon its general fund, it becomes of no consequence whether the city be enjoined to this extent or not. Counsel for the city also

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contends that the lumber company is not entitled to any relief as against the assessment levied upon its tide lands because of its failure to make any objection thereto to the city council when the assessment roll was before the city council upon due notice for confirmation; and also contends that, in no event, has the lumber company any right to have cancelled the assessments made against the other tide lands within the district in which it has no interest. Counsel for the lumber company contends that it is entitled to relief to the full extent granted by the final judgment of the superior court, from which this appeal is taken. These contentions, we understand from the record before us, were also made in the superior court.

Counsel for the lumber company invokes the general rule as stated in the text of 22 Cyc. 966, as follows:

"The decree may afford complete relief as to injuries that have been consummated since the suit was begun; for even though no temporary injunction was obtained, defendant acts at his peril in doing *pendente lite* the acts sought to be enjoined."

For present purposes, we may assume that the lumber company is entitled to have the assessments upon the harbor area cancelled, and also to have the city enjoined from charging its general fund with any portion of the cost of the improvement, since the city is not here insisting that it has the right to have such assessments enforced, or to so charge its general fund. But the question of the power of the court to now cancel and enjoin the collection of the assessments which have been regularly levied against the tide lands upon due notice and not appealed from to the courts, is quite another matter.

In so far as the assessments levied upon the tide lands other than those belonging to the lumber company is concerned, we do not see that it has any right whatever to question such assessments. It is true it originally brought proceedings looking to the enjoining of the construction of the

improvement, but it brought this action only in its own behalf, so manifestly it cannot complain of assessments upon lands in which it has no interest. Such assessments may be unimpeachable because of their being regularly levied upon due notice and remaining unchallenged by the owners of the property so assessed. Indeed, such seems to be their status as shown by the record.

The more serious question here presented is, Has the lumber company the right to now have cancelled the assessment levied upon its tide lands? Now we have seen that all of these assessments against the lumber company's tide lands were also levied upon due notice; that no objection was made thereto by the lumber company or any one, nor was appeal to the courts taken therefrom; and that this was all done at a time when there was no restraining order or injunction in force preventing the city from so proceeding. Manifestly, the fact that the lumber company was then seeking an injunction by appeal to this court from the dismissal of its case in the superior court, to prevent the city from so proceeding, did not deprive the city of jurisdiction in the premises. The irregularity occurring in the inception of the local improvement proceedings by inclusion of the harbor area in the assessment district may have been sufficient to then entitle the lumber company, as a taxpayer and also as the owner of property to be assessed, to have the court "enjoin the improvement as proposed," as was held in our former decision, but that did not deprive the city of jurisdiction to proceed with the improvement and assessments, in so far as it was seeking to charge by assessment property which was assessable for local improvements. Now, plainly, the tide lands owned by private persons, as these lands are, are assessable as any other private property, to pay the cost of local improvements; while, as held in our former decision, harbor area and leasehold interests therein are not assessable to pay the cost of local improvements. Hence the city had jurisdiction of the *subject-matter* of assessing such tide

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lands, while it did not have jurisdiction over the *subject-matter* of assessing harbor areas or leasehold interests therein. That the city's jurisdiction was complete as to the tide lands, so far as the assessment proceedings and notice of hearing before the council upon the question of confirmation of the roll is concerned, seems plain from this record. Indeed, that such notice was given as the law directs is not here questioned. It is also plain that no objections to any of the assessments were presented to the council, nor was any appeal taken to the courts from the confirmation of the roll. Why then, is not the confirmation of this assessment roll a final determination binding upon all owners of tide lands, including the lumber company, so assessed? The reason that it is not binding upon the owners of leasehold interests in harbor area is because the city had no jurisdiction over the subject-matter of assessing harbor areas or leasehold interests therein.

Section 23, p. 455, Laws of 1911, of the general local improvement law, under which the city proceeded, reads:

“Whenever any assessment-roll for local improvements shall have been confirmed by the council or other legislative body of such city or town as herein provided, the regularity, validity and correctness of the proceedings relating to such improvement, and to the assessment therefor, including the action of the council upon such assessment-roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the council in confirming such assessment-roll in the manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor: *Provided*, That this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds (1) that the property about to be sold does not appear upon

the assessment-roll, or (2) that said assessment has been paid." 3 Rem. & Bal. Code, § 7892-23.

This court has repeatedly held that such a determination by the city council, had upon due notice under previously existing statutes similar to this, became final as to all owners of property so assessed, unless the assessment was attempted to be levied under such circumstances that the city was exceeding its jurisdiction over the *subject-matter*. This question is reviewed at some length in *Rucker Brothers v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582, where our former decisions are noticed. The doctrine was adhered to in *Grandin v. Tacoma*, 87 Wash. 98, 151 Pac. 254, involving an assessment under this statute.

All of these assessments upon lands, including those belonging to the lumber company, other than the harbor area, being made and confirmed upon due notice, no objection thereto being made by any one, and no appeal taken to the courts therefrom, we are of the opinion that such assessments became binding and conclusive upon the lumber company as well as upon all other owners other than those owning leasehold interests in the harbor area; and that, in the light of facts occurring since the original trial of this case in the superior court, our former decision should not now be construed as impairing the validity of any of the assessments so made and confirmed, other than those assessments made against the harbor area, as to which the city had no jurisdiction.

It is worthy of note here that these assessments were levied and apportioned against all of the lands within the district, including the harbor area, as if all the lands were assessable for local improvements. Assuming that the assessments were equitably apportioned, as we must, in view of the fact that they were confirmed without objections, in so far as lands other than harbor area are concerned, it would follow that the lumber company's tide lands are bearing no more than their just proportion of the cost of the improvement.

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Therefore it is difficult to conceive of any wrong resulting to the lumber company, viewing it only as the owner of these tide lands. The same may be said of all other owners of lands within the district other than the harbor area. It seems plain that the rights of the lumber company as owner of the tide lands, which are assessable for local improvements, must be viewed apart from its rights as a general taxpayer and as owner of a leasehold interest in the harbor area. Its rights in the latter respect it is entitled to have protected by the final judgment of the court, if such rights are not already sufficiently protected by the attitude voluntarily assumed by the city towards the assessments against the harbor area and the protection of the city's general fund. But, viewing the lumber company as the owner of the tide lands, its complaint here amounts to no more than that the assessments are void because of irregularities occurring on the inception of the proceedings taken by the city. This, however, we have seen does not go to the jurisdiction of the city over the subject-matter, and due notice having been given of hearing upon the confirmation of the assessment roll and the same having been confirmed without objection, all prior irregularities were thereby cured and the assessment became final against the lumber company as to its tide lands, as well as against other owners of lands in the district other than the harbor area.

Our attention is called to the act of the legislature found in Laws of 1915, at page 363, providing that all leasehold rights and interests of private persons in or to harbor areas within the limits of an incorporated city or town are subject to assessment to pay the cost of local improvements. We do not regard this act as having any controlling force in this cause, in view of its enactment subsequent to the making of these assessments. We express no opinion at this time touching the power of the city of Blaine to charge, by reassessment or supplemental assessment, any deficiency in the

local improvement fund against leasehold interests in the harbor area which may be benefited by this improvement.

The judgment of the superior court is reversed in so far as it cancels and enjoins the collection of any of the assessments levied upon lands within the district, including the lands of the lumber company, other than those assessments levied upon the harbor area. In all other respects the judgment is affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

[No. 12851. Department Two. January 24, 1916.]

GERMAN-AMERICAN STATE BANK, *Respondent*, v. SEATTLE GRAIN COMPANY, *Appellant*.¹

CHATTEL MORTGAGES—CROPS—FORECLOSURE—NECESSARY PARTIES—CONVERSION—LIABILITY. One who converts a portion of a mortgaged crop of wheat by commingling it with other wheat is not a necessary party to an action to foreclose the chattel mortgage on the crop, and in case of a deficiency judgment, is liable for the conversion, although not made a party to the foreclosure action.

SAME—FORECLOSURE—JUDGMENT. Judgment for the debt in the foreclosure action did not operate as a release or waiver of the security.

SAME — CROPS — CONVERSION — LIEN OF MORTGAGE — SUBSEQUENT EQUITIES. In such a case, it is no defense that the converted wheat was taken in payment for sacks furnished for the harvest of the crop, which was equitably bound for the sack account, as against the recorded lien of the chattel mortgage.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered December 8, 1914, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Affirmed.

Wakefield & Witherspoon (H. T. Davenport, of counsel), for appellant.

G. E. Lovell, for respondent.

¹Reported in 154 Pac. 443.

MORRIS, C. J.—Respondent was the holder of two chattel mortgages upon the wheat crop of one Setters, an Adams county farmer, the amount secured by these mortgages being \$9,500. After the wheat was harvested, Setters delivered approximately 1,000 bushels of the grain to appellant in payment of an indebtedness of \$666.40 for sacks furnished the previous year. Appellant, upon receiving the grain, placed it in its warehouse in a common mass with other grain of like quality purchased by appellant from other farmers. This fact coming to the knowledge of respondent, it began a foreclosure of its mortgages, making Setters only defendant. A decree of foreclosure was entered, the property in Setters' possession sold, and a deficiency judgment entered against Setters in the sum of \$1,656.60. Thereupon, respondent commenced this action against appellant to recover the value of the wheat obtained by it from Setters, claiming a conversion. Judgment was entered in its favor, and the grain company appeals.

It is contended, first, that the foreclosure action is a bar to this action. The argument supporting this claim is that, it appearing that respondent knew, prior to the commencement of the foreclosure proceeding, that appellant was in possession of a portion of the wheat, it was a necessary party to the foreclosure proceeding if respondent intended to hold it liable for the value of the wheat in its possession. This contention is not sound. Appellant was a proper but not a necessary party to the foreclosure suit. The mortgages gave respondent a lien upon the wheat, of which appellant had notice through the public records. When, therefore, it took the wheat from Setters and commingled it with its own it was an act of conversion. The lien of the mortgages still existed, and these liens were not lost when the bank sought judgment on its debt, together with a foreclosure of its security. The foreclosure proceeding resulted in a deficiency judgment against the mortgagor, and when the security

failed to extinguish the debt, the mortgagee had the right to proceed against any person who had converted any part of the security, and this right was in nowise dependent upon whether the one so converting was or was not a party to the foreclosure proceedings. *LaRue v. St. Anthony & D. Elevator Co.*, 17 S. D. 91, 95 N. W. 292; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331. The judgment for the debt in the foreclosure action operated neither as a waiver nor a release of the security. *Muncie Nat. Bank v. Brown*, 112 Ind. 474, 14 N. E. 358.

The second contention is that respondent was equitably bound to pay the sack account due appellant, upon which the wheat obtained was credited. In the face of respondent's lien and its right to proceed against either the property or the person wrongfully appropriating it, it is needless to discuss any equities resting in appellant. Whatever its rights may have been, they were subject to those evidenced by respondent's liens.

The judgment is affirmed.

BAUSMAN, MAIN, PARKER, and ELLIS, JJ., concur.

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Opinion Per MORRIS, C. J.

[No. 12850. Department One. January 25, 1916.]

H. RYAN, *Appellant*, v. S. E. HANNA *et al.*, *Respondents*.¹

CONTRACTS — EMPLOYMENT — CERTAINTY. A contract whereby defendant agreed that, if at any time she should desire to erect a building in any place in the cities of S. or E., she would employ the plaintiff as architect to prepare the plans and superintend the construction, is so wanting in certainty as to the terms of the employment as to be unenforcible.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 7, 1914, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Douglas, Lane & Douglas, for appellant.

McClure & McClure and *Walter S. Osborn*, for respondents.

MORRIS, C. J.—Action for breach of contract. Appeal from a judgment of dismissal upon the sustaining of a demurrer to the complaint.

The complaint recited that, prior to January 25, 1909, Ryan and the defendant Hanna entered into an agreement, whereby Hanna employed Ryan as architect for a building which she contemplated constructing in Seattle; that, in accordance with the agreement, plans were prepared and other services performed by Ryan of the value of \$1,800; that, in procuring these services, Hanna and the Sampson Investment Company acted jointly; in fact, the Sampson Investment Company is Hanna incorporated; that subsequently respondents determined to postpone the erection of the building, and, in order to effect a settlement with Ryan, made and entered into the following agreement with him:

“Seattle, Wash., January 25, 1909.

“The undersigned, Mrs. S. E. Hanna, does hereby declare as follows: that she employed Mr. H. Ryan of Seattle, as

¹Reported in 154 Pac. 436.

architect for a building which she contemplated erecting at Westlake avenue and Stewart street, in Seattle, and that said Ryan prepared plans which were acceptable to her, but that she was unable to procure a loan upon satisfactory terms, and therefore concluded that she would not erect a building according to said plans.

"But in consideration of a settlement made this day with said Ryan, the undersigned does now hereby agree that if she should at any time desire to erect a building in any place in Seattle or Everett, that she will employ said Ryan as her architect to prepare plans and to superintend the construction of such building. And further, she does now hereby expressly declare that she has absolute confidence in the integrity of said Ryan as an architect in every respect.

"Witness:

"S. E. Hanna."

"Fred H. Peterson."

It is then alleged that respondents breached the agreement and employed one Dow, as architect and contractor, to erect a building on Pike street, Seattle; that said building was completed prior to July, 1913, at a cost of not less than \$12,000. It is further alleged that, by reason of the breach of the contract in failing to employ appellant as architect and superintendent of the building, he has been damaged in the sum of \$600.

We think the demurrer was well taken. It is clear, as contended by appellant, that an action will lie upon an instrument containing a promise to pay a given sum upon the happening of some contingency, like a promise to pay a given sum of money upon the sale of certain land, as in *Schweitzer v. Schweitzer*, 26 Ky. Law 889, 82 S. W. 625, or the sale of a mine, as in *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; this upon the theory that the only uncertain element in the contract, that of time, has been rendered certain by the happening of the event. But this is not such a contract. If the contract contained a promise to pay a given sum upon the erection of a building in Seattle or Everett, and the building had been erected, the cause would be like those relied upon by appellant. The only uncertainty would have been removed.

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This contract has too many uncertainties which neither time nor any other contingency can supply, save the making of a new contract between the parties. It fails to state on what terms the employment is to be entered upon, whether appellant or respondent is to name the terms and conditions, or whether they are to be determined mutually. Suppose appellant refuses to accept terms satisfactory to respondent. Is the erection of the building to be deferred until he is satisfied with the terms offered him? Or, suppose he is unable to proceed. Must the erection of the building be deferred to suit his convenience?

Many other like deficiencies suggest themselves, rendering this contract too uncertain to be enforced. The court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it. As was said in *Weldon v. Degan*, 86 Wash. 442, 150 Pac. 1184:

“The so-called contract is no more than an agreement for an agreement, or, in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete, and to which any one of the parties might object if proposed.”

Many other observations in the *Weldon* case are applicable here, and our decision may safely rest upon what is there said.

The demurrer was properly sustained, and the judgment is affirmed.

MOUNT, FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 12782. Department Two. January 25, 1916.]

**A. R. GAREY, *Appellant*, v. THE CITY OF PASCO,
Respondent.¹**

JURY—RIGHT TO JURY TRIAL—EQUITY. Const., art. 1, § 21, providing that "the right to trial by jury shall remain inviolate" has no application to actions of equitable cognizance.

ACCOUNT—MUTUAL ITEMS OF ACCOUNT—PLEADINGS—ISSUES. In an action for a balance due on a building contract for the construction of a city hall, including extras, in which the city set up numerous items of set-off and counterclaim and prayed for an accounting, so that the items claimed by each were items of mutual account, the plaintiff is not entitled to a jury trial, as the pleadings raise issues determinable as for an accounting.

CONTRACTS—BUILDING CONTRACTS—DEMURRAGE — WAIVER — TERMINATION OF CONTRACT. A city, upon terminating a contract for the construction of a city hall and taking over the work of completing the building, cannot claim damages under the demurrage clause, calling for \$25 per day for delay in completing the building; where the delay up to that time was waived or the fault of the city.

SAME—BUILDING CONTRACTS—CERTIFICATES AND PARTIAL PAYMENTS —ESTOPPEL. Under a building contract providing that no certificate given or payment made during the progress of the work shall be construed as an acceptance, the city is not estopped from asserting set-offs and counterclaims by reason of certificates of the architects which were not final and partial payments made thereon.

TRIAL—REOPENING CASE. It is discretionary to reopen the case for further evidence, after the parties had rested and the court had the case under advisement.

COSTS—ON APPEAL—REDUCTION OF JUDGMENT. Appellant having secured a reduction of \$875 in the judgment, is entitled to costs on appeal.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered January 5, 1915, in favor of the defendant, in an action on contract, tried to the court. Modified.

Charles W. Johnson, for appellant.

Edward A. Davis, for respondent.

¹Reported in 154 Pac. 433.

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Opinion Per PARKER, J.

PARKER, J.—This action was commenced in the superior court for Franklin county by A. R. Garey against the city of Pasco, to recover a balance claimed to be due him upon a contract and for extras furnished for the construction of its city hall. The city denied that any sum was due to Garey upon the contract price or for extras, and set up, by way of affirmative defense and cross-complaint, numerous items of set-off and counterclaim, and prayed for an accounting and an affirmative judgment thereon against Garey for a large sum. Trial before the court without a jury resulted in judgment in favor of the city and against Garey for the sum of \$4,353.74, rendered on January 5, 1915, from which he has appealed to this court.

Counsel for appellant, Garey, made timely demand for trial of the cause before a jury, and tendered the statutory fee therefor. The trial judge, being of the opinion that the case was triable before the court without a jury as a suit in equity for an accounting, denied appellant's demand for a jury trial, and proceeded with the hearing of the case upon the merits without a jury as for an accounting. This ruling is complained of by counsel for appellant as erroneous, in that it denied him the constitutional right of trial by jury. There is, therefore, presented the question of whether this is a case triable by jury as a matter of right, within the meaning of § 21, art. 1 of our constitution providing that, "The right to trial by jury shall remain inviolate."

It hardly needs argument or citation of authorities to show that this constitutional guaranty does not entitle a party to a jury trial in a case of a class which has always been recognized as being within the jurisdiction of courts of equity; since such cases never were triable by jury as a matter of right. This guaranty means no more than that the right of trial by jury shall continue as it existed at the time of the adoption of our constitution. 24 Cyc. 101. It seems equally plain that an action for an accounting, prop-

erly maintainable as such, is one of equitable cognizance. 1 R. C. L. 222.

On August 1, 1911, appellant Garey entered into a contract with the city of Pasco, by the terms of which he agreed to furnish all of the material and labor for the construction of a city hall for the city, it agreeing to pay him therefor the sum of \$27,492. He was to construct the building according to plans and specifications prepared therefor by C. Lewis Wilson, an architect, and under his direction. The city reserved the right to furnish certain brick for the building and to deduct the cost thereof from the contract price. The city also reserved the right to make changes in the work, and the contract price was to be deducted from or added to accordingly. The city also reserved the right to enter upon the premises and complete the building upon the failure of the appellant to perform the contract, deducting the cost thereof from the contract price, and if such cost exceeded the unpaid balance of the contract price, such excess was to be repaid by appellant to the city. Appellant was to be liable to the city for any damages because of the failure to perform his contract, the amount of such damages to be deducted or repaid in the same manner. Appellant was also liable to the city for liquidated damages in the sum of \$25 per day, to be deducted from any balance due appellant upon the contract, for each day consumed in his completion of the building after December 31, 1911, that being the time fixed by the terms of the contract for the completion of the building. Appellant, however, was to be allowed extra time for certain unavoidable delays, and also for delays resulting from the fault of the city. As the work progressed, appellant was paid from time to time sums upon the contract price aggregating \$23,368.20. He claims an additional sum for numerous extras furnished, and claims a balance of \$6,438 due to him from the city. The foregoing facts appear in the allegations of the complaint, a copy of the contract being attached thereto as an exhibit.

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In its answer and cross-complaint, the city denies that any balance is due to appellant, and sets up, by way of affirmative defense and cross-complaint, numerous items of set-off and counterclaim. It prays for an accounting between itself and appellant, and claims a balance due to it from appellant of \$12,433. These claims of the city made against the appellant consisted of numerous items: for failure to complete the building within the time agreed upon; for damages resulting to the city by failure of the appellant to place proper material in the building as agreed, according to plans and specifications; for money expended by the city in completing the unfinished portion of the building as it was left by appellant; for deductions because of changes in the plans and specifications lessening the cost of the building; and, in effect, for repayment by appellant to the city of excess payments made to him during the progress of the work. Appellant, by his reply, denies all of the affirmative allegations of the city's answer and cross-complaint.

Looking to all of the allegations of these pleadings, we cannot escape the conclusion that they raise issues determinable as for an accounting by a court of equity. These items are numerous and complicated and consist of mutual demands made by the parties, each against the other. In the text of 1 C. J. 613, we read:

"The basis of equity jurisdiction over matters of account has often been discussed, and while it is said that the necessity for a discovery was originally the foundation of the court's jurisdiction, it is no longer restricted to cases of that description, and the best considered authorities put the equitable jurisdiction upon three grounds, to wit: The need of a discovery, the complicated character of the accounts, and the existence of a fiduciary or trust relation."

The ground of "complicated character of accounts" may of itself be subject to some qualification in several jurisdictions, but when that ground is accompanied with the element of mutuality of accounts, it seems to be agreed by all the

authorities that the determination of the balance due from one party to the other becomes a proper subject of equity jurisdiction. This view is supported by the text and numerous authorities cited in 1 C. J. 618. That these items claimed by each of the parties against the other are items of mutual account, in a legal sense, seems plain when we remember that, by the very terms of the contract above noticed, it was manifestly contemplated that such claims, so far as they are just and valid, should be regarded as mutual; that is, that they should be offset in favor of each party against the other for the purpose of determining any balance due from either party to the other. In Black's Law Dictionary (2d ed.), 17, mutual accounts are defined as follows:

"Accounts comprising mutual credits between the parties; or an existing credit on one side which constitutes a ground for credit on the other, or where there is an understanding that mutual debts shall be a satisfaction or set-off *pro tanto*, between the parties."

See, also, 1 R. C. L. 205; 1 C. J. 598.

We conclude that the nature of the issues raised by these pleadings, involving as they do the settlement of mutual and complicated accounts, are such as to call for the trial of the case by a court of equity, and that appellant was not entitled to a trial by jury.

As to the merits of the case, the record is very long and the facts much involved. Our review of the evidence leads us to the conclusion that it preponderates in favor of the conclusions reached by the trial court, in so far as the questions of fact are concerned, except as to one item allowed by the trial court in favor of the city, which we are unable to assent to as a proper allowance to the city. It is an item of \$875, allowed to the city as damages under the \$25 per day liquidated damage provision of the contract.

The trial court was evidently of the opinion that the city was not entitled to any substantial allowance under this provision of the contract for delay prior to the time the city

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took possession of the building and proceeded with the completion thereof itself. We agree with the view that the delays up to that time were waived by the architect or were as much the fault of the city as of appellant. It results, therefore, that almost all of this item of \$875 demurrage is being allowed the city for time following its taking the building away from appellant and proceeding itself with the completion thereof. We are not sure that this is exactly the interpretation that should be given to the trial court's views; but looking at the record as a whole, we think that the city was not entitled to any demurrage up until the time it actually took possession of the building and proceeded with its completion. By the allegations of the city in its answer, we are informed that it "terminated said contract," and "that said building was taken away from the said A. R. Garey" on September 24, 1912. The city could not terminate the contract and at the same time claim under the contract the liquidated damage contracted for in case of delay; though, of course, it could claim actual damages, as to which there is no evidence. This question was considered by the supreme court of Alabama in *Fidelity & Deposit Co. v. Robertson*, 136 Ala. 379, 411, 34 South. 933. Justice Sharpe, speaking for the court, said:

"On the proof in this record damages for delay in building, if the plaintiff should be found entitled to recover such damages, should be estimated according to the loss actually sustained on that account by the fault of Adams, Wright & Gossett rather than by the stipulation in their contract on that subject. Apparently that stipulation was intended to be effective only in the event of those contractors continuing in the work under the contract beyond the time it fixed for their delivery of the house. The plaintiff having before that time, declared the contract forfeited and treated it so by ousting Adams, Wright & Gossett from its further performance cannot maintain that the contract was thereafter continuing so as to bind them to such further performance. As bearing on this question though not strictly in point see *Lennon v. Smith*, 124 N. Y. 578."

See, also, 30 Am. & Eng. Ency. Law (2d ed.), 1263.

Some contention is made that certificates by the architect and payments made thereon to appellant from time to time by the city, especially the last one so given and honored estops the city from claiming its items of set-off and counterclaim. Plainly no certificate was ever given which amounted to a final acceptance of the building by the city. The contract provides that no certificate given or payment made during the progress of the work shall be construed as an acceptance of the work. We think the city is not estopped by these certificates as to any of the claims it makes, other than as to its liquidated damage claim.

Some contention is made in appellant's behalf that the court erred in opening the case, some time after the parties had rested and while the court had it under advisement, for further evidence offered by the city. This was clearly a matter of discretion, as to which we see no abuse. However, even if all the new evidence so received be rejected, the result would have been the same, as the record seems to disclose the views of the trial judge. We agree with this view.

We conclude that the city is not entitled to any allowance under the liquidated damage provision of the contract, and that the judgment rendered against appellant is excessive in the sum of \$875, which was allowed to the city as liquidated damages. In all other respects the judgment is affirmed. The cause is remanded to the superior court with direction to correct the judgment so that it will be for the sum of \$4,353.74, less the sum of \$875, to wit, \$3,478.74. When so corrected, the judgment shall be deemed entered as of January 5, 1915, so as to bear interest from that date.

Appellant, having obtained a substantially more favorable judgment in this court than the judgment appealed from, is entitled to his costs incurred in this court.

MORRIS, C. J., MAIN, and ELLIS, JJ., concur.

BAUSMAN, J., took no part.

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[No. 12739. Department One. January 28, 1916.]

WILLIAM B. RITCHIE, *Trustee, Respondent*, v.
VICTORIA L. TRUMBULL *et al.*, *Appellants*.¹

PARTIES — PLAINTIFFS — TRUSTEE OF EXPRESS TRUST — QUIETING TITLE. A trustee of an express trust may maintain an action to quiet title in his own name without joining the *cestui que trust*.

QUIETING TITLE—PARTIES—TRUSTEE OF EXPRESS TRUST—IDENTITY OF CESTUE QUE TRUST. In an action to quiet title, brought by a trustee of an express trust against parties claiming through his grantor, the identity of the *cestuis que trustent* is immaterial, as long as the grantor was not the beneficiary of the trust.

COURTS—PROBATE COURTS—JURISDICTION—ESTATE HELD IN TRUST—CONVEYANCES. The probate court has jurisdiction to authorize the administratrix to convey property held in trust by the decedent, title to which was disclaimed by the estate.

CORPORATIONS—CONTRACTS—REPRESENTATION—CONVEYANCE TO OFFICERS—TITLE. Where an insolvent railroad company conveyed tide lands, held under contract of purchase from the state, to its trustees, under an agreement that they should pay the installments falling due, which the company could not pay, and should hold the land, unless the company repurchased the same within three years, which it failed to do, the title vested in the trustees, as against one succeeding to all the other interests of the company with full notice of the prior conveyance.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered June 3, 1914, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Thomas F. Trumbull and *Ballinger & Hutson*, for appellants.

William B. Ritchie and *Fletcher & Evans* (*Robert B. Walkinshaw*, of counsel), for respondent.

MOUNT, J.—This action was brought to quiet title to certain tide land lots in front of the city of Port Angeles, in Clallam county.

¹Reported in 154 Pac. 816.

The plaintiff sues as trustee, alleging that he is the trustee for F. H. Carlisle, Flora E. Craig, Charles B. Smith, W. F. Delabarre, F. B. Carlisle, and Rachel Newman; that, as such trustee, the record title of the real estate described is vested in him; that he owns and holds the same in trust for the above named persons; that the lands are tide lands; that the plaintiff and his grantors have paid the taxes and assessments against the same since the year 1900. The plaintiff also alleges that the defendants claim some interest in the lands, but that the same is wrongful and not of right.

The defendants, for answer to the complaint, admit the character and description of the lands, and deny all the other allegations of the complaint; and as an affirmative defense, allege: That in December, 1912, the property was sold under a judgment obtained by John Trumbull against the Port Angeles & Eastern Railroad Company, and that the defendants purchased the lands under that judgment, and claim title thereunder.

The reply admits the alleged death of John Trumbull, who obtained the judgment, but denies all the other allegations of the affirmative answer. Upon these issues, the case was tried to the court without a jury. Findings were made in favor of the plaintiff. A decree was entered quieting the title in the plaintiff. The defendants have appealed.

The principal facts in the case are not in dispute. They are record facts. It is admitted that the Port Angeles & Eastern Railroad Company, through its treasurer, Arthur Shute, on September 1, 1899, entered into several contracts with the state of Washington to purchase the lands described in the complaint, and other lands. These contracts provided for annual payments extending over a period of eight years. The amount due upon the contracts each year was \$800, and interest. The railroad company made the first payment upon the contracts. Thereafter, and two days before the next payment became due, when the state could forfeit the contracts if the payment was not made, the con-

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tracts, fifteen of them, were assigned by the railroad company to David W. Craig, as trustee. The consideration named in the assignment was one dollar. These assignments were acknowledged before John Trumbull, since deceased, who was then a notary public. When these assignments were submitted to the commissioner of public lands of the state, he refused to approve them unless the parties for whom the land was held were named. Thereupon Mr. Craig, the trustee, to whom the assignments had been made, wrote a letter to the commissioner of lands of the state, saying:

"A party comprising the following gentlemen have purchased the interest in these lands held by the P. A. E. R. R., and with their holdings intend forming a terminal company in the future: Arthur Newman, F. H. Carlisle, C. Vey Holman, Fred A. Cooke, Lemuel Pope, and David W. Craig. They have appointed me as their trustee."

Thereupon the commissioner of public lands approved the assignments. Thereafter David W. Craig caused to be paid each year the taxes, interest, and principal due upon the contracts until the same were fully paid. The money to make these payments was furnished by Mr. Craig and his associates.

Thereafter, on May 9, 1907, the state executed deeds to David W. Craig, trustee, for the real estate covered by the contracts. In the year 1906, the railroad company, then being insolvent and probably insolvent at the time the assignments of the contracts above stated were made, executed quitclaim deeds to Mr. Trumbull for all the lands it then owned, which were held in trust by one James Stuart. It also made a bill of sale of all its office furniture and fixtures to Mr. Trumbull. Mr. Trumbull was then attorney for the railroad company. After the trustee above named had acquired title from the state, sales of some of the lands were made to other parties, and deeds were executed by the trustee.

In February, 1912, Mr. Craig died, his estate was probated, and Flora E. Craig, his wife, was appointed as ad-

ministratrix thereof. In that estate she presented a petition to the superior court stating, in substance, that the property now in suit was held by David W. Craig, in trust for the persons named in the complaint in this case as beneficiaries; that Mr. Craig had no interest therein. She asked for the appointment of the plaintiff as trustee to hold the property instead of the deceased. At the same time, powers of attorney from persons claiming to be *cestuis que trustent* were filed authorizing the appointment of the plaintiff, William B. Ritchie, to act as trustee. Thereupon the superior court made an order directing the administratrix to execute a deed of the property to the plaintiff as trustee. A deed was subsequently executed.

Thereafter, on December 12, 1912, John Trumbull took a default judgment against the Port Angeles & Eastern Railroad Company in the sum of \$19,918.25, and costs. An execution was issued upon that judgment, and levied upon the tide lands now in dispute. They were sold at sheriff's sale and bid in by the defendants, heirs of John Trumbull. On the 24th day of February, 1914, a sheriff's deed was issued to the defendants.

These facts are all admitted in the case. It is plain, we think, that the legal title to this property rests in the plaintiff. His title is deducible of record from the state of Washington. It is argued by the appellants that the beneficiaries of the trust are not the same as the beneficiaries mentioned in the letter from Mr. Craig to the commissioner of public lands; and that, therefore, it was error for the trial court to receive in evidence the contracts made by the state for the sale of the lands with the assignments thereon. There is no merit in this contention, because it was not necessary for the *cestuis que trustent* to be made parties to the action.

The statute provides, and this court has held, that the trustee of an express trust may maintain an action in his own name. *Carr v. Cohn*, 44 Wash. 586, 87 Pac. 926. It is of no importance to the appellants who the beneficiaries of

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the trust are, so long as the beneficiary is not the railroad company, through whom they necessarily must claim.

The appellants also argue that the court erred in receiving in evidence the probate record wherein the court ordered Mrs. Craig, the wife of the deceased trustee and the administratrix of his estate, to execute a deed to the respondent in this action. If we understand the contention, it is that the probate court had no jurisdiction to authorize the administratrix to make such a deed. This court has held that the probate court has power to determine all matters necessary to the due administration of an estate; and it certainly has authority to authorize the administratrix to convey property held in trust. In *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42, after referring to the case of *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147, and other cases, we said:

"Under the rule of these cases, it is clear that a superior court in a probate proceeding can exercise all of the powers of a court of general jurisdiction. It has power in such a proceeding to determine every matter necessary to the due administration of an estate, and it is its duty to do so, when such matters are properly presented for its consideration."

We are satisfied, therefore, that the superior court had jurisdiction to authorize the making of the deed, and that the deed from the administratrix to the respondent conveyed whatever interest the deceased, as trustee, had. The respondent, as his successor, therefore stands in the same position as the original trustee. It is plain, therefore, that the plaintiff in this case holds the legal title from the state of Washington to himself, subject to the trust.

Before the appellants in this case can prevail, it is necessary for them to show that the Port Angeles & Eastern Railroad Company had some interest in the property at the time of the sale under the judgment of John Trumbull against that company. The appellants attempt to show this

by arguing that the original trustees were officers of the railroad company; that there was no consideration paid for the assignment from the railroad company to David W. Craig. It is true that the original trustees were officers of the railroad company. It is probably true that the railroad company at that time was insolvent. But we think the record fairly shows that, at the time of the assignment, the second installment of the purchase price for the lands due the state would be due within two days, and the railroad company had no money with which to continue the contracts. And the evidence fairly shows, also, that, at that time, the railroad company entered into a contract with these officers to the effect that these officers would make payments becoming due; that the railroad company would repurchase the property by paying the amount which those officers had advanced, and that if repurchase was not made within three years, then the rights of the railroad company would be forfeited. There is no evidence that the railroad company retained any other interest in these contracts. Six years later the railroad company conveyed all its real estate and personal property to John Trumbull, and did not include therein any of the lands in these contracts. John Trumbull was then the attorney for the railroad company. He, as a notary public, had taken the acknowledgments of the assignments of the contracts by the railroad company for the lands in dispute, and we have no doubt knew all the circumstances of that transfer. There is no claim made that the railroad company, or any one for it, repurchased the lands, or offered to do so.

We are satisfied, from a review of all the facts in the case, that the railroad company had no title to, or interest in, the lands in dispute at the time the judgment of Mr. Trumbull was levied upon these lands. If the railroad company had no interest, then, of course, a sale under that judgment would convey no interest to the purchaser. We are satisfied

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that the respondent holds both the legal and equitable title, and that the trial court arrived at a correct conclusion.

The judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting)—The equitable title to the land was in the railroad company and passed under the execution sale to appellants. The railroad company could have asserted its right at any time. The deed to respondent and the powers of attorney gave him no interest, for the parties had no personal interest to convey or protect. Craig was trustee for the railroad company; not for the other parties. They were all trustees in equity for the railroad company, and not *cestuis que trustent*, as is held by the majority.

For these reasons, I dissent.

[No. 12744. Department One. January 28, 1916.]

*In the Matter of the Estate of LESLIE L. CRIM,
W. K. MINER, Appellant.*¹

EVIDENCE — PAROL EVIDENCE TO VARY WRITING — ADMISSIBILITY. Parol evidence of an agreement is not objectionable as varying the terms of a written contract, where the agreement rested in parol and the writing was not contemporaneous or for the purpose of evidencing the contract, but was made a month later merely to satisfy the banker of one of the parties.

APPEAL—REVIEW—FINDINGS. A finding cannot be disturbed on appeal where the evidence does not preponderate against it.

APPEAL—REVIEW—FINAL ORDERS—CONFIRMING PROBATE SALE. An order in probate on proceedings by petition, confirming the sale of personalty, is a final disposition of the matter, and appealable within ninety days, under Rem. & Bal. Code, § 1716, subd. 1, relating to appeals from final judgments.

EXECUTORS AND ADMINISTRATORS—SALES—RATIFICATION OF VOIDABLE SALE—REVOCATION OF LETTERS. An executor's sale of personalty, prior to the probate of a nonintervention will, fairly done to preserve

¹Reported in 154 Pac. 811.

the estate from forfeiture and to pay debts, is voidable merely, and not void; and the admission of the will to probate and appointment of the executor by a court of competent jurisdiction ratifies the sale, notwithstanding the probate was thereafter annulled because of testamentary incapacity.

SAME—SALE TO PAY DEBTS—FAIR PRICE—EVIDENCE—SUFFICIENCY. Where the only property of an estate consisted of mining stock of speculative value, pledged by decedent for a loan, for which it was about to be forfeited, and no one else was willing to purchase the stock at any price, a sale of one-fourth of the stock for \$790, is fair, and should be confirmed, although it was represented to the purchaser that there was a prospect of selling all of the stock for \$70,000.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered February 6, 1915, in favor of the petitioner, in proceedings in probate for the confirmation of a contract made with the executor of a will. Affirmed.

Milo A. Root, for appellant Miner.

C. D. Murnane and Ballinger & Hutson, for respondent and appellant Tremper.

ELLIS, J.—This case arises on a petition in probate for the confirmation of a contract with an executor of a will, which will was subsequently declared void for lack of testamentary capacity and undue influence, and for delivery to the petitioner of certain shares of stock claimed by him under the contract.

Leslie L. Crim died, leaving a purported nonintervention will. One Gourley was named therein as executor and trustee. The estate consisted of two hundred thousand shares of the capital stock of Lost River Tin Mining Company, a corporation owning the inchoate title to an unpatented tin mining claim in Alaska. The other assets were admittedly so insignificant as to be negligible.

Some time prior to his death, Crim had executed a promissory note to the Scandinavian American Bank of Seattle, and had deposited all of the certificates of this stock with the bank to secure payment of the note. Shortly before its ma-

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turity, the bank transferred the note to one Sadie E. Smith, who, as it appears, intended to forfeit the pledged stock on the maturity of the note in default of payment. At the time of the transaction here in question, the debt evidenced by the note amounted, with interest, to \$790. There were other debts amounting to \$460. Prior to probating the will, but assuming to act under it, Gourley sought to procure a loan upon, or to sell a part of, the stock to raise money to redeem the stock and pay these debts. Failing elsewhere, as he testified, he applied to the petitioner, Miner, and on September 5th, 1911, it was agreed between them that, in consideration of a sale to him of one-fourth of the stock, Miner would pay to Gourley \$1,250 with which to redeem the stock and pay the other debts. Pursuant to this agreement, on that day the money was paid to Gourley, who at once made a tender of the amount of the note to the bank, and a few days later to the attorney for Sadie E. Smith. These tenders were refused.

The only conflict in the evidence is as to the agreement between Gourley and Miner. Gourley testified that Miner was to receive only one-fourth of the stock. In this he is corroborated by another witness to whom Miner applied for a loan of the money, and who testified that Miner then told him he was to receive one-fourth of the estate. Miner testified that the original agreement was that he should receive one-half of the stock. In this he is corroborated by his wife, who was present when the agreement was made.

On October 3, 1911, Gourley sent to Miner a paper as follows:

"Islandale, Washington, October 3, 1911.

"This is to certify that whereas the estate of Leslie L. Crim is incumbered by a certain note, due September 8, 1911, and unpaid, and having no funds of the estate to meet payment of said note and other indebtedness now due, and acting under clause 2 of the last will of Leslie L. Crim, which authorizes me as executor and trustee to pay out of his estate all debts outstanding, I hereby agree for the sum of \$1,250 to me paid

to assign 100,000 shares of the capital stock of the Lost River Tin Mining Company, of Alaska, as soon as the same is transferred to me upon the books of said company, to W. K. Miner.
(Signed) T. H. Gourley."

Gourley explained that this was given to satisfy a bank to which Miner owed money; that the bank had threatened Miner with proceedings for a receivership, and that this paper was given to Miner to exhibit to the bank, and that it was without other consideration. Miner admitted that the agreement was reduced to writing to satisfy his banker, but testified that it embodied the true terms of the original verbal agreement of September 5th.

The will was probated September 18, 1911. Gourley was appointed executor pursuant to its terms, and entered upon the management of the estate. He brought an action against Sadie E. Smith for the recovery of the stock, and paid the \$790 into court in that action to keep his tender good. That action finally resulted in a judgment in Gourley's favor, which judgment, on February 28, 1914, was affirmed by this court on appeal. *Gourley v. Smith*, 78 Wash. 286, 139 Pac. 58.

Meanwhile a contest of the will was instituted, which resulted in a decree setting aside the will on the grounds of testamentary incapacity and undue influence. On appeal that decree, on March 7, 1914, was affirmed by this court. *Ingersoll v. Gourley*, 78 Wash. 406, 139 Pac. 207, Ann. Cas. 1915 D. 570. E. P. Tremper was then appointed, qualified, and is now acting, as administrator *de bonis non* of the estate. In this proceeding, which had been held in abeyance pending the contest of the will, the trial court, on February 6, 1915, entered a decree ratifying and confirming the sale of stock by Gourley to Miner, but finding that it was only for one-fourth of the stock—fifty thousand shares—instead of one-half, or one hundred thousand shares, as claimed in the petition. From that decree, the petitioner prosecutes an appeal, and the administrator *de bonis non* a cross-appeal.

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The appellant contends that the writing of October 3, 1913, cannot be controverted by parol evidence, and that, in any event, the court erred in finding that the agreement was for fifty thousand instead of one hundred thousand shares.

The first claim is effectually answered by the fact that the writing of October 3d was not a contemporaneous writing intended to evidence the contract. It was written almost a month after the contract had been fully performed on Miner's part. It was admittedly made, not for the purpose of evidencing the contract as between the parties, but for the sole purpose of satisfying Miner's banker. When the original agreement was made and the money paid by Miner, there was no intention that the agreement should ever be reduced to writing. The writing was based upon no new consideration. Unless it did in fact embody the terms of the actual agreement upon which the money was paid, it could not be binding upon the estate so as to estop the representative of the estate to question its terms. Parol evidence of the agreement of September 5th, as made and performed by Miner, was properly admitted.

As to whether the original agreement was a sale of fifty thousand or one hundred thousand shares, the evidence is in sharp conflict. We have attentively studied the record. We cannot say that the evidence preponderates against the court's finding.

The appellant moves to dismiss the cross-appeal as tardily taken. The notice was given more than fifteen days but less than ninety days after the entry of the decree. The appellant claims that the cross-appeal falls under subdivision 6 of § 1716, Rem. & Bal. Code (P. C. 81 § 1183). It is clear, however, that it falls under subdivision 1 of that section. Though the proceeding was by petition in the probate of the estate, the decree was a final disposition of the matter in controversy. The time for appeal was therefore ninety days. *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147. The motion is denied.

The cross-appellant contends that the contract was not merely voidable but void; that the will having been declared void for lack of testamentary capacity and undue influence, the sale was thereby annulled. The case of *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578, is cited and relied upon. In that case, an administrator mortgaged real estate under an order of court based upon a petition affirmatively showing that the personal property of the estate had not been exhausted, and there was no showing that the estate was actually the recipient of the money loaned. That case is readily distinguishable from the one before us.

Had the will in the case here never been held invalid, there could be no question that the sale, if a fair one, would have been valid and binding upon all persons interested, since the stock was the only asset and the sale was made for the purpose of raising money to save the balance of the stock and to pay debts of the estate, and it is admitted that the money was so used. Under the will, no bond was required of the executor and no order of court was necessary for such a sale. The subsequent probate of the will, therefore, in effect ratified the sale. The probate of the will supplied all that was necessary to establish the authority to make the sale. That is all that an order ratifying a sale could do even in a case where an order of sale would have been necessary. This is self-evident. The order admitting the will to probate was made by a court of competent jurisdiction. It had jurisdiction of the subject-matter. A different case would be presented had the assumed testator been still alive. The order was not void, but only voidable. Things, therefore, done under it, or ratified by it, *if necessary to and fairly done in the due and legal course of administration*, such as raising money to pay the debts and preserve the assets, are valid and binding upon all interested.

“And the rule to be favored at the present day is, that all acts done in the due and legal course of administration are valid and binding on all interested, even though the letters is-

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sued by the court be afterwards revoked or the incumbent discharged from his trust. And although one's appointment as executor or administrator may have been erroneous, or voidable, the safer doctrine is, that the letters and grant issued from the probate court shall not be attacked collaterally where the court had jurisdiction at all, and least of all by common-law courts; and that the acts of the representative *de facto* shall bind the estate and innocent third parties." 2 Schouler, Wills, Executors and Administrators (5th ed.), pp. 1121, 1122.

The case of *Brown v. Brown*, 7 Ore. 285, presents a state of facts in the main closely analogous to that presented here. The court said:

"The fourth point relied on by the appellants as a defense is that the will having been declared void by the probate court, the sale of the land to the respondents was thereby annulled. We hold the law to be otherwise. The probate court had exclusive jurisdiction of the subject-matter in regard to the probate of what purported to be the will of Cyrus Olney. It was duly proved to be his will before that court, and letters testamentary were issued thereon, and until these proceedings were annulled the validity of the will could not be collaterally drawn in question by any one, nor by any other court. Administration of the estate under it could be conducted and enforced, as under any other will duly proved. Such being the case all acts done in the due course of administration, while the will remained unannulled, and the letters testamentary were unrevoked, must be held entirely valid."

In *Foster v. Brown*, 1 Bail. L. (S. C.) 221, 19 Am. Dec. 672, speaking of a sale by an administrator who had fraudulently suppressed a will, the court said:

"It is true that, on the revocation of an administration, for whatever cause, he to whom the subsequent administration is granted may maintain trover against the first administrator for goods of the deceased which he has converted to his own use. But it is equally clear that all acts done in the due and legal course of administration are valid and binding on all interested, although it be afterwards revoked. *Benson v. Rice and Byers*, 2 N. & M. 577. Nor can the manner of

obtaining the administration, whether fairly or fraudulently, vary the question. Suppose it fraudulently obtained, yet if the administrator pays the debts of the estate, or does any other act which a rightful administrator would be bound in law to do, thus far, at least, it would be fair, and for the most obvious reasons would be binding."

Mutatis mutandis the language quoted applies with even more force to the case here.

As said in *Kittredge v. Folsom*, 8 N. H. 98:

"There is evidently an inaccuracy in the use of the term *void*, in many instances in the books, upon this and other subjects; and the attempt to reconcile all the authorities upon the matter now under consideration must be in vain. An administration granted by the competent authority, upon a proper case made, can with no propriety be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. 6 Co. 19, *Packman's case*; 2 Lev. 90, *Semine v. Semine*. The acts of such administrator must be quite as valid as those of an executor under a will which has been revoked by the testator. The grant of administration confers an existing authority, which cannot be resisted or disregarded until the will appears. 1 Lev. 235; *Noel v. Wells*. The administrator in such case comes into his office by color of an authority. *Plowe*. 282. He is administrator *de facto*, and his acts, done in due course of administration, must be valid, at least so far as third persons are concerned. 7 N. H. R. 131."

See, also, *Shephard v. Rhodes*, 60 Ill. 301; *Roderigas v. East River Savings Institution*, 63 N. Y. 460, 20 Am. Rep. 555; *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980; *Foulke v. Zimmerman*, 14 Wall. (U. S.) 113.

We do not say that we would go as far as some of the cases which we have cited go, but we do say that they furnish ample authority for the view that Gourley was administrator *de facto* until his appointment was revoked; that the sale of the stock was not void but only voidable, and cannot be avoided, as against the purchaser, Miner, if found to be fair

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and for the benefit of the estate, and we so hold. A different case would be presented had the sale been made by a devisee, as such, under a void will and solely for his own benefit. *Hughes v. Burriss*, 85 Mo. 660.

It remains, therefore, only to inquire whether the sale was, under the circumstances, a fair one. It was clearly for the benefit of the estate that the stock be saved from forfeiture and that the debts of the estate be paid. It is fairly apparent that no one but the appellant, Miner, was willing to advance the money for this purpose on any terms. The value of the stock was purely speculative. Though Gourley represented to Miner at the time that he had a sale in prospect which would net \$70,000 for all of the stock, it was only a prospect. The fact remains that at least \$790 had to be raised at once in order to save the stock, whatever its value, and there is not the slightest evidence that even that amount could have been raised in any other manner or on better terms than those accepted by Miner. There is no evidence that Miner, at least, acted otherwise than in good faith. He was willing to take a chance that others would not take. The cross-appellant concedes that he is entitled to a return of his money with interest, but the contract was not for a loan, it was a sale. We find no warrant in the evidence for holding the contract void. Having taken a chance which has resulted in preserving to the heirs whatever of value there is in the estate, we think Miner is entitled to the benefit of his contract.

Affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and FULLERTON, JJ.,
concur.

[No. 12746. Department One. January 28, 1916.]

MARSHALL-WELLS HARDWARE COMPANY, *Appellant*, v. TITLE
GUARANTY & SURETY COMPANY, *Respondent*.¹

LIMITATION OF ACTIONS—TOLLING STATUTES—INJUNCTION TO PREVENT SUITS—APPEARANCE—PROCEEDINGS—EFFECT ON STAY—STATUTES. Where an action was brought in the Federal court by the surety in the bond of a public contractor, to enjoin a multiplicity of suits on the bond and the transfer of funds by state officers, until the claims against the bond could all be established in one action, which claims the surety confessed a willingness to pay, and in which action the claimants appeared to prove their claims, but no injunction was issued, and the suit was finally dismissed as to all claimants whose claims against the bond were less than \$2,000, the Federal suit does not operate to toll the statute of limitations against actions on the bond, under Rem. & Bal. Code, §§ 172, and 173, providing that, if an action is stayed by injunction, the time of the continuance of the injunction shall not be a part of the time limited, and that, if an action shall be commenced within the time prescribed therefor and judgment for plaintiff be reversed on appeal, the plaintiff may commence a new action within one year thereafter; since no injunction was issued and there was no appeal from or reversal of the decree of the Federal court.

SAME—TOLLING STATUTES — AGREEMENT — CONDITIONS. In such a case, the surety company is not equitably estopped to set up the three-year statute of limitations against subsequent actions on the bond by the fact that, in the Federal suit, it agreed that, if the claimants would enter an appearance in the Federal court, the claims would be paid as soon as properly established as true claims against the bond; since a promise to toll the statute of limitations must be clear, definite, and unconditional; and the promise was upon the condition of establishing the claims, which condition was not performed.

SAME — TOLLING STATUTE — AGREEMENT — ELECTION OF REMEDIES. The voluntary appearance of the claimants in the Federal suit to avoid an injunction against their prosecution of suits on the bond in the state court, and in reliance on the establishment of their claims in the Federal suit, was an election of remedies, and not a waiver of the statute of limitations by the surety, in the absence of an express agreement to that effect.

¹Reported in 154 Pac. 801.

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Appeal from a judgment of the superior court for King county, Humphries, J., entered February 27, 1915, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

Cassius E. Gates, for appellant.

James B. Murphy and *Williamson, Williamson & Freeman*, for respondent.

MOUNT, J.—The trial court sustained a demurrer to the plaintiff's complaint. The plaintiff elected to stand upon the allegations thereof and the action was dismissed. This appeal followed.

The complaint alleges, in substance, that, in July, 1910, W. F. Guernsey & Company entered into a contract with the state highway commission for the construction of a state aid road in King county; that, in accordance with the provisions of Rem. & Bal. Code, § 1159 (P. C. 309, § 93), W. F. Guernsey & Company executed and filed a bond on which the defendant in this action is surety; that thereafter, between August 8 and September 27, 1910, the plaintiff furnished culvert pipe of the value of \$1,478.27, which culvert pipe was used in the work; that a claim was filed against the bond on June 9, 1911; that the work was accepted by the highway commission on September 3, 1911. The complaint also sets out a copy of the bond, which is a joint and several bond. This action was brought against the bonding company alone. The complaint was filed and served on June 16, 1914.

It is conceded by the appellant that the action is barred by the three-year statute of limitation, unless the further facts pleaded in the complaint have suspended the operation of the statute. The allegations of the complaint upon that question are as follows:

“That heretofore, and in the month of September, 1911, the defendant herein instituted suit in the United States

District Court for the western district of Washington, northern division, entitled Title Guaranty & Surety Company, a corporation, complainant, vs. W. F. Guernsey, *et al.*, defendants, No. 2022, and in April, 1912, filed an amended complaint alleging *inter alia* as follows: That said W. F. Guernsey & Company had entered into a contract with the state of Washington as alleged in this complaint, and that pursuant to said contract, said W. F. Guernsey & Company had entered upon the work of performing the same, and had in fact, completed the work, and that said work had been accepted by the state; that the said complainant had executed a bond in behalf of said W. F. Guernsey & Company, to secure the faithful performance of said work; that said bond was duly accepted and filed; that said W. F. Guernsey & Company had not at the time of the completion of said work under said contract, sufficient property or assets from which any claim of the complainant might have against it, could satisfy, and had not sufficient property subject to execution in said district or in the state of Washington, or elsewhere, and that said company was wholly unable to respond in damages sufficient to reimburse complainant for any sums for which it might be liable under said bond; that many claims had been filed with the state highway commissioner against said bond, and many of said claims were for less than the sum of two thousand dollars, and not appealable to the supreme court of the state of Washington; that a uniform holding might not be obtained in each case and that since the commencement of said action in the Federal court, certain of the claimants brought suit upon said bond, some in a court of one county, and some in the court of another; that many of them were threatening to bring suit in the justice court and the superior court, upon claims not appealable to the supreme court; that some of said suits were prosecuted against the surety alone and the court refused to require the principals upon said bond to be joined; that said complainant believed that if the said claimants were not restrained therefrom, a multiplicity of suits would be instituted in different courts entertaining different opinions as to the construction of said statute regarding suits upon bonds of this character, and that the only way in which uniform rulings could be had upon all of said claims, was a suit in equity such as the complainant filed at that time; that said complainant stood ready

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and willing at all times, to pay any and all claims, and fully perform the covenants of its bond as soon as and whenever said claims were properly established as true claims against said bond; that the defendants in said action, the state highway commissioner of the state of Washington, the state treasurer of the state of Washington, the state auditor of the state of Washington, the county treasurer and county auditor of King county, had in their possession certain funds which they were threatening to turn over to the Scandinavian-American Bank of Tacoma, and claimed said funds by virtue of a purported assignment thereof from said W. F. Guernsey & Company.

"That in said action the said complainant therein, which is the defendant in this action, prayed the court for an injunction restraining and enjoining said state and county officials from transferring any funds in their possession, which said injunction was entered in said action on October 9th, 1914, and in said action said complainant prayed for an injunction against all the defendants therein, including the plaintiff in this action, restraining them from instituting or prosecuting any other suit upon said bond. That the undersigned attorney for plaintiff in this action was advised of the filing of said complaint, and was threatening to file suit in the superior court against said bonding company, but at the request of James B. Murphy, counsel and attorney in fact for said Title Guaranty and Surety Company, filed in said action, an appearance in order to eliminate the necessity of having a restraining order served upon this plaintiff; that said appearance was entered relying upon the allegations contained in said complaint and relying particularly upon the allegation therein to the effect that said bonding company, defendant herein, would pay any and all claims as soon as said claims should be properly established as true claims against said bond. That a large number of the other defendants in said action who had furnished materials and labor for use in the construction of the work under said contract, also filed appearances and cross-complaints in said action; that this plaintiff endeavored at numerous times, to have said case set down for trial but that it was delayed and did not come on for trial until the 14th of May, 1914. That the said defendants who furnished material and labor aforesaid, introduced evidence in support of their respective claims, and that this

plaintiff proved that the material alleged in this complaint to have been furnished, was actually used in the construction of said road, and was a valid claim against said bond. That after all the evidence in said case was introduced, the court in that action, upon motion of the alleged assignee of said W. F. Guernsey & Company, dismissed said action as to all cross-complainants whose claims were less in amount than two thousand dollars (\$2,000). That although said motion was filed in the name of said assignee, it was in truth and in fact made at the request and for the benefit of the defendant in this action.

"That plaintiff alleges that said action was instituted, and the delay of the trial thereof, caused by defendant herein for the sole purpose of defeating the claim of this plaintiff and others similarly situated, and that the defendant herein is threatening to plead the statute of limitations as against the claim of this plaintiff on the ground that more than three years have expired since the materials used in the construction of said road were delivered; that the plaintiff herein has at all times acted in good faith and would not have appeared in said action in the Federal court except for the fact that an injunction had been prayed for in said suit, and that its appearance therein would tend to avoid a multiplicity of suits, and except for the further fact that plaintiff in that action asserted its willingness and promised therein to pay all claims as soon as they should be properly established as true claims against said bond.

"That defendant in this action has by its acts, words and conduct aforesaid, estopped itself from pleading the statute of limitations in this action, and that said defense is not available to the said defendant at this time; that said defendant is preparing to plead the statute of limitations as a defense and should be enjoined from so doing."

The question presented upon this appeal is whether these allegations are sufficient to estop the defendant from raising the question of the statute of limitations. The statute, at § 172, Rem. & Bal. Code (P. C. 81 § 89), provides:

"When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

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Section 173, Rem. & Bal. Code (P. C. 81 § 91), provides:

"If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff . . . may commence a new action within one year after reversal."

It is plain, we think, that these provisions of the statute are not applicable to this case, for the reason that no injunction or statutory prohibition is alleged in the complaint. It is not alleged or claimed that the action in the Federal court has been reversed. So that it is plain that these provisions of the statute are not applicable to the present action.

It is argued at some length by the appellant that the facts above pleaded constitute an equitable estoppel against the defendant from raising the statute of limitations. It is no doubt the rule that, where a fraud, or circumstances amounting to a fraud, prevents a party from maintaining an action against another, the equitable rule of estoppel will apply. The authorities are abundant to that effect. This court has held in *Kreielsheimer v. Gill*, 85 Wash. 175, 147 Pac. 871, that, where a promise is made to pay as soon as a suit against a person secondarily liable is over, regardless of the outcome of that suit, and a creditor was thereby induced to delay the enforcement of his claim, an equitable estoppel would follow. But we think that case does not control here, by reason of the fact that in that case there was an absolute promise to pay. And furthermore, the account in that case was, by the act and solicitation of the payor, put beyond the control of the creditor for the time being, and the suit was still pending thereon. The rule is plain that, where there is a promise to pay, before it will toll the running of the statute of limitations, the promise must be certain, definite, and unconditional. *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *Bank of Montreal v. Guse*, 51 Wash. 365, 98 Pac. 1127; *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987; *Coe v. Rosene*, 66 Wash. 73, 118 Pac. 881, Ann. Cas. 1913 C. 741, 38 L. R. A. (N. S.) 577.

The promise alleged in this case, as stated in the complaint above quoted, was that, if the plaintiff in this case would enter an appearance in the Federal court, the claim of the plaintiff would be paid "as soon as said claims should be properly established as true claims against said bond." This was clearly a conditional promise to pay and meant, of course, that, if the plaintiff in this case would make an appearance in that case, and properly establish his claim against the bond, the claim would be paid. The only way the claim could be established in that case was by a judgment of the court. It is true it is alleged in the complaint that the plaintiff in this case "proved that the material alleged in this complaint to have been furnished was actually used in the construction of said road and was a valid claim against said bond." It is then alleged, "that after all the evidence in said case was introduced, the court in that action, upon motion of the alleged assignee of said W. F. Guernsey & Company, dismissed said action as to all cross-complainants whose claims were less in amount than \$2,000." So it is clear there is no allegation that the claims of the appellant were allowed in that case; but the fact is, as stated in the complaint, that the claims were not allowed, and as to the appellant, the action was dismissed.

The complaint above quoted also alleges that, in the case in the Federal court, an injunction was sought, and that this plaintiff, in order to avoid the issuance of an injunction, entered an appearance in that case. It is apparent that the appellant was not compelled to enter an appearance in that case. It could do so or not as it saw fit. No injunction was issued against the appellant. If an injunction had been issued, then clearly, under the terms of the statute above referred to, the statute of limitations would not run pending that injunction. The plaintiff, therefore, voluntarily entered its appearance relying, as it says, upon establishing its claim as a true claim against said bond in that court. In other words, the appellant elected its remedy in the Federal court

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instead of maintaining an action in the state court. In electing that remedy, the statute ran against the claim in the state court. *Hinchman v. Anderson*, 32 Wash. 198, 72 Pac. 1018; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271.

It is stated in the complaint in this case that an injunction was entered in the Federal court on October 9, 1914. That injunction, according to the allegations of the complaint, ran only against state officers mentioned in the complaint in the Federal court, and was not effective against this appellant. It is not claimed, as we understand, that any injunction was issued against this appellant in the Federal court. It entered that court voluntarily. It was not required to remain there, but could, at any time, have been dismissed therefrom, and could have brought an action in the state court. This fact distinguishes this case from the case of *Kreielsheimer v. Gill*, *supra*. Clearly there is no agreement to waive the statute of limitations alleged in the complaint in this action. The only agreement attempted to be alleged is that the plaintiff, in the Federal court, promised this appellant that if it would make an appearance in the Federal court, and there properly establish as true its claim against the bond, then this appellant would be paid. There was evidently no thought in this promise to waive the statute of limitations. It has been held that the statute of limitations will run unless waived by an agreement expressly or clearly to be implied. *McKay v. McCarthy*, 146 Iowa 546, 123 N. W. 755, 34 L. R. A. (N. S.) 911.

In *Monroe v. Herrington*, 110 Mo. App. 509, 85 S. W. 1002, it was said:

“In order to prevent the defense of the statute of limitations by estoppel or waiver, there must have been a distinct agreement by the party sued not to interpose the defense. Mere reliance on the debtor’s promise to pay if not sued, affords no ground for cutting him off from the defense when sued. (*Hill v. Hilliard*, 103 N. C. 34; *Joyner v. Massey*, 97 Mo. 148; *Bank v. Hill*, 10 Humph. (Tenn.) 176, 51 Am. Dec. 698; *Andre v. Redfield*, *supra*, [98 U. S. 255]).”

We are satisfied, therefore, from the allegations of the complaint above set out, that there was no agreement to waive the statute and no fraud, and no ground for equitable estoppel. The trial court was right in sustaining the demurrer.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 12751. Department One. January 28, 1916.]

In the Matter of the Estate of F. S. BLATTNER.

DORA D. BLATTNER, *Administratrix, Appellant*, v.

W. H. ABEL, *Respondent*.¹

INSURANCE—LIFE INSURANCE—PROCEEDS—EXEMPTION FROM DEBTS—STATUTES. Construed together as *in pari materia*, Rem. & Bal. Code, § 6158, providing that, if a policy of insurance is effected by any person on his own life, the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors, was intended to modify the sweeping provisions of Id., § 569, providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt; hence, to claim the exemption, the insurance must be payable to some beneficiary "other than the assured or his legal representatives."

Appeal from an order of the superior court for Pierce county, Clifford, J., entered January 28, 1915, upon findings in favor of a creditor of an estate, after a hearing upon objections to the final report of the administratrix. Affirmed.

Chapman & Bailey and *L. B. da Ponte*, for appellant.

A. R. Titlow and *W. H. Abel*, *in pro per*, for respondent.

MOUNT, J.—This appeal is from an order of the lower court directing the administratrix of the estate of F. S. Blattner to pay to the respondent, out of the proceeds of certain insurance upon the life of Frank S. Blattner, the sum of \$2,921.70, together with the costs of the action, less such

¹Reported in 154 Pac. 796.

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sum as Mr. Abel hereafter receives as distributee of the general funds of the estate.

There is no substantial dispute upon the facts, which are, briefly, as follows: On June 26, 1912, Mr. Abel delivered to Mr. Blattner two notes for the sum of \$1,500 each, to be cashed for the purpose of raising \$3,000, which was to be used by Mr. Blattner, as agent of Mr. Abel, in purchasing certain real estate. Mr. Blattner cashed these notes and obtained the money therefor. He did not purchase the real estate, but held the money in his possession. Thereafter Mr. Blattner lost his life. The money which he had received from Mr. Abel had been mingled with his own private funds, and came into the hands of the administratrix as assets of the estate. After the death of Mr. Blattner, his widow was appointed as administratrix of his estate.

In March, 1913, Mr. Abel presented his claim to the administratrix, the same was allowed by her, and in January, 1914, the claim was approved by the court and became a claim against the estate. Thereafter payments were made upon the claim amounting to \$493.77.

At the time of his death, Mr. Blattner had two insurance policies upon his life payable to his estate. These policies amounted to \$14,258.83. They were collected by the administratrix. Thereafter, upon an *ex parte* application of the administratrix, without notice to Mr. Abel, the court made an order directing one-half of the insurance money to be paid to Mrs. Blattner, and the other half to Dorothy M. Blattner, the daughter of the deceased. Upon the final report of the administratrix being filed, Mr. Abel objected to the payment of the insurance money to the widow and the daughter of the deceased. Upon the hearing of these objections, the court entered the order herein appealed from.

The principal question presented is whether the proceeds of a life insurance policy payable to the estate of the deceased is exempt from the debts of the deceased where, in his

lifetime, the property of the deceased would not be exempt from the payment of this claim.

Many pages of the briefs of the appellant and the respondent are taken up with a discussion whether § 564, Rem. & Bal. Code (P. C. 81 § 875), is applicable to this case. This section provides that no property shall be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys or other property coming into his hands from or belonging to his client or principal. But in view of our conclusion upon another question which seems to us to control, we shall not pass upon the applicability of that statute to this particular case.

The appellant relies upon the provision of Rem. & Bal. Code § 569 (P. C. 81 § 881), which provides:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

It is strenuously argued that, because the money in question was derived from an insurance upon the life of Mr. Blattner, under this section it is exempt from the payment of Mr. Abel's claim. This statute is a sweeping statute; and this court has many times held that, when considered alone, it applies to all debts created after the statute took effect. *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. 851; *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326; *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, L. R. A. 1915 A 1201; *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221.

Section 6158, Rem. & Bal. Code, provides as follows:

"If a policy of insurance is effected by any person on his own life, or on another life in favor of a person other than himself having an insurable interest therein the lawful beneficiary thereof, other than himself or his legal representa-

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tives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors and representatives of the person effecting the same; and the person to whom a policy of life insurance is made payable may maintain an action thereon in his own name”

In the case of *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank, supra*, it was contended that this latter statute repealed Rem. & Bal. Code, § 569 (P. C. 81 § 881), above quoted; but we denied that contention, saying, that if it was repealed at all it was repealed by implication, and “That repeals by implication are not favored is the established doctrine in this state, and that they will not be allowed unless the will of the legislature is so manifest that the statutes cannot be read *in pari materia* without violence to the earlier statutes is a fundamental rule of construction from which courts are not at liberty to depart.” Neither the opinion nor the record in that case shows the beneficiary of the insurance policy. The question presented in the case at bar was neither decided nor discussed in that case, except in so far as we held that § 569 was not repealed by implication by § 6158. It is apparent, from our decision in that case, that we regarded these two statutes as being *in pari materia*, and that they should be construed accordingly. We think it is plain from the provision of § 6158 quoted, that the legislature intended that the proceeds of a life insurance policy should be exempt from creditors of the estate only when the beneficiary in the policy is some person other than the insured himself or his legal representatives, for it says:

“If a policy of insurance is effected by any person on his own life, . . . the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors and representatives of the person effecting the same;”

Otherwise, the phrase “other than himself or his legal representatives” is entirely meaningless, for the statute, at § 569

above quoted, provides that the proceeds and avails of all life and accident insurance shall be exempt from all liability for any debt. We think it was intended by the later statute to modify that sweeping provision of the former statute to the extent of providing that, if a policy of insurance is effected by any person on his own life in favor of himself or payable to his estate, in such a case the proceeds are not exempt against the creditors and representatives of the person effecting the insurance. When these two statutes are construed together *in pari materia*, we think that is clearly the meaning, because the words "other than himself or his legal representatives" were used for a purpose, and that purpose was to limit the exemption, as stated.

In the case of *German-American State Bank of Ritzville v. Godman, supra*, we held that the proceeds of certain insurance policies, payable to the estate of the insured and to the legal representatives of the insured, were not subject to certain debts. In that case, the point now being considered was not raised or discussed, for in that case we said:

"Although not relied upon by the appellants, it is equally plain that Laws 1909, p. 556, § 36 (Rem. & Bal. Code, § 6158), have no application to the facts in the case at bar."

The decision in that case was rested principally upon the provisions of § 569, and the court did not attempt to construe the provisions of § 6158, *supra*, as affecting that section, because the point was not relied upon. It was held in that case that the words "legal representatives" mean ordinarily executors or administrators. We there said:

"The law does not differentiate between policies payable to the 'executors, administrators, or assigns,' and policies payable to 'the estate' of the insured."

This is plainly so; and where a policy is made payable to one's estate, it is payable to his legal representatives. We are therefore satisfied that, under the provisions of § 6158 above quoted, it was the intention of the legislature that the proceeds of insurance policies payable to an estate should be

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liable to the creditors of the estate. In order that the proceeds may not be liable to the creditors of the estate, the insurance must be effected in favor of a beneficiary other than the insured or his legal representatives: for example, the wife, a child or children, or some other specified person. Where the policy is made payable to the insured or to his estate, or "his legal representatives," the proceeds thereof are not exempt, but are available to the creditors of his estate. This being so, it is plain that the trial court was right in holding that the proceeds of this policy were liable for the debt in question.

The judgment is therefore affirmed.

MORRIS, C. J., and CHADWICK, J., concur.

FULLERTON, J. (concurring)—While I concur with the majority in the conclusion reached in this cause, I do not think it can be differentiated from the case of *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221. It is true the parties to that appeal did not cite or rely upon the statute now found to be controlling, but the court itself did not overlook the statute. On the contrary, the statute was cited in the opinion and held to have no application. I did not have the privilege of sitting at the hearing in the earlier case, but I thought then, and I think now, that a wrong conclusion was reached therein. This opinion, therefore, should do in terms what it does in fact, namely, overrule that case, to the end that no uncertainty should exist as to the rule properly to be applied to like cases.

ELLIS, J., concurs with FULLERTON, J.

[No. 12765. Department One. January 28, 1916.]

C. M. SMITH *et al.*, *Respondents*, v. CHARLES IMHOFF,
Appellant.¹

FRAUDS, STATUTE OF—AGREEMENT AS TO REAL ESTATE—SPECIAL PARTNERSHIP—TRUSTS. A special partnership in real property, which need not be in writing, is created, where it was orally agreed that the defendant should purchase certain property and put up the cost of platting it, and that the plaintiffs should forego their commissions, have the same surveyed and sell it, the profits to be equally divided; hence the same is not within the statute of frauds, and the principle of trust, express or resulting, is not applicable.

PARTNERSHIP—IN REAL ESTATE—PROFITS—INSTRUCTIONS. In such a case, it is proper to instruct that, if such an agreement was entered into and the defendant paid the purchase price and expenses and agreed that the profits should be equally divided, the plaintiffs were entitled to one-half the profits, and it was not necessary to instruct as to the existence of the partnership, that being a question for the court upon the admitted facts.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered November 16, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

William J. Biggar and *Thomas R. Waters*, for appellant.
George Livesey, for respondents.

MOUNT, J.—This action was brought to recover a balance of \$404.12, alleged to be due upon an oral agreement made by the defendant with the plaintiffs, whereby the defendant agreed to purchase certain real estate, and all the parties agreed to sell the same and to divide the profits equally between the plaintiffs and the defendant. Upon issues joined, the case was tried to the court and a jury. At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved for a directed verdict. These motions were denied. The case was submitted to

¹Reported in 154 Pac. 793.

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the jury, and a verdict was returned in favor of the plaintiffs for the sum of \$265.15. After a motion for a new trial was denied, a judgment was entered in favor of the plaintiffs. The defendant has appealed from that judgment.

The facts are as follows: In January, 1909, the plaintiffs, who were engaged in the real estate business, had listed with them for sale the real estate in question for the sum of \$1,800. Their commission for the sale of the property was to be five per cent, or \$90. They advised the appellant that if he would purchase this property they would deduct their commission so that the purchase price would be \$1,710 net to him; that if he would purchase it and survey it into twenty-acre tracts, the plaintiffs, together with the defendant, would find a purchaser, repay to the defendant the money he had paid as the purchase price, for surveying, and the expenses of keeping the property, and that then the plaintiffs and the defendant would divide the profits.

The appellant thereupon purchased the property for \$1,710, and took a deed in his own name. Thereafter the plaintiffs sold the timber upon the land separately, and afterwards the land itself was sold. The total amount received for the land and the timber was \$4,684.96.

The defendant, prior to the sale, had paid out for surveying, taxes, and other expenses, something over \$300, so that the total amount paid by him upon the land was \$2,176.21. There is some dispute in the evidence as to the amount that was paid out by the defendant.

The complaint, after alleging the copartnership of the plaintiffs, and that they had the real estate listed for sale upon commission, alleged as follows:

“That at said time plaintiffs and said W. I. Brisbin agreed orally with defendant that the above described property should be purchased by all of said parties and the title thereto was to be taken in the name of defendant. That at the time of said purchase, it was understood and agreed by all of said parties that defendant was to advance the price to

be paid for said property, to-wit, \$1,710, and it was further understood and agreed that all of said parties should use their best efforts to make an advantageous sale of said property, and that when a sale was made, the first moneys derived out of said property should be used by said parties to repay to defendant such moneys as he might have paid on said property, and that any surplus over and above the amount of money paid by defendant on said property should be divided equally between plaintiffs and said W. I. Brisbin on the one side and defendant on the other."

The principal point presented upon this appeal by the appellant is to the effect that this alleged contract, being an oral agreement for an interest in real estate, cannot be proved by parol; that it was the duty of the trial court, for that reason, to direct a verdict for the defendant at the close of the plaintiffs' case, and also at the close of all the evidence in the case.

A large number of authorities are cited in the appellant's brief to the effect that an express trust in real estate cannot be proven by parol. It is argued that, if this contract is anything, it is an express trust. There can be no doubt that an express trust in real estate cannot be proven by parol. This court has many times so held. *Malmo v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569. But we think the question of a trust, either express or *ex maleficio*, is not in this case. The evidence for both the plaintiffs and the defendant upon the trial shows conclusively that the agreement between the parties was to the effect alleged in the complaint. It was an oral agreement that if the defendant would purchase the property at the price of \$1,710, the plaintiffs would forego their commission of \$90, to which they would be entitled if the property were sold to other parties at the list price; and upon a resale of the property, after paying the defendant the money which he had invested therein, that the profits should be divided equally between them. There is apparently no dispute upon this question. The evidence is clear and conclusive to that effect. In other words,

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we think it is clear from these facts that these parties entered into a special partnership for the purchase and sale of the real estate; the defendant advanced \$1,710; the plaintiffs reduced their commission by \$90, so that the plaintiffs had an investment of \$90, while the defendant had an investment of \$1,710 in the purchase price. It was clearly, we think, a special partnership purchase of this particular piece of property. It was not necessary that the partnership agreement should be in writing.

"It is generally held that agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing." 20 Cyc. 237.

This court in *Case v. Seger*, 4 Wash. 492, 30 Pac. 646, a case similar to this, said:

"It is contended by the respondents that an agreement to purchase and sell land, which is not in writing, is in contravention of the provisions of the statute of frauds, and cannot, therefore, be enforced. While the appellant contends that a parol agreement of this kind can be enforced. It cannot be questioned that there is a conflict of decision on this point."

Then the court referred to the case of *Smith v. Burnham*, 3 Sum. 435, and *Dale v. Hamilton*, 5 Hare 369. In the latter case, it was held that a partnership agreement, where the parties were interested in a speculation for buying and improving land for sale, may be proven without being evidenced by a writing signed by the parties to be charged. This court then said:

"We think the weight of authority, and especially modern authority, supports *Dale v. Hamilton*, and we are inclined to follow the doctrine there announced."

And in *Flower v. Barnekoff*, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149, the supreme court of Oregon discusses at length the authorities upon this question, and concludes:

"From a careful examination of the authorities, we are of the opinion that a valid contract of partnership for the purpose of speculating in real estate may be made by parol."

We are satisfied from the reasoning in these cases that the agreement made here was a valid agreement which could be proved by parol, and did not come within the statute of frauds, and does not involve the question of a trust, either express or resulting. We are of the opinion, therefore, that the trial court properly submitted the case to the jury.

Several assignments of error in the appellant's brief are based upon instructions which were given by the court, or requested by the defendant and refused to be given by the court. The trial court instructed the jury, in substance, that if they found from the evidence that the agreement alleged in the complaint was entered into between the plaintiffs and the defendant at the time of the purchase of the property, and that the defendant paid the purchase price thereof, less the usual commission, and agreed that the property should be held and sold at such profit as could be obtained therefor, and that the profits should be divided equally between the plaintiffs and the defendant, that then they should find for the plaintiff. We are satisfied that this was a correct instruction upon the question; and if the jury found from the evidence as the court instructed them, then it was their duty to return a verdict in favor of the plaintiffs for one-half the profits.

The court also instructed the jury with reference to the expenses which the defendant had incurred upon the property, and that if they found the agreement had been complied with, that then they should return a verdict in favor of the plaintiffs for the balance of one-half the profits. It seems plain that these instructions fully covered the case, and it was not necessary to instruct the jury with reference to what constituted a partnership, as was requested by the defendant. Under the admitted facts, it was for the court to say whether a partnership existed or not with reference to this

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particular land. We are satisfied that if the court was required to instruct at all upon this question, it was to tell the jury that there was a partnership. It is needless, therefore, to review the requested instructions upon these points.

The main point in the case is whether or not the agreement could be proven by parol. From our conclusion above upon that question, it follows that the judgment must be affirmed, and it is so ordered.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 12833. Department One. January 28, 1916.]

ERNST HUSCHKE, *Appellant*, v. ARCADIA ORCHARDS COMPANY,
Respondent.¹

WATERS AND WATER COURSES—IRRIGATION—CONTRACT TO FURNISH—TIME—REASONABLE TIME. Where a deed of land, together with a perpetual water right, calls for a supply of water, without fixing the time when the same was to be furnished, the law fixes the time as a reasonable time, considering the facts within the contemplation of the parties at the time the contract was made.

SAME—CONTRACTS—ACTION FOR DAMAGES—PLEADING — COMPLAINT—SUFFICIENCY. In an action for damages for breach of contract to supply water called for in a water deed, the complaint states a cause of action in alleging the failure to supply the water and the resulting injury to fruit trees set out, and it is immaterial that plaintiff misconceived the measure of damages, and asked for the difference between the value of the land with and without water upon it, instead of the damage done to the fruit trees.

SAME—CONTRACTS—BREACH—MEASURE OF DAMAGES. In an action for damages for failure to supply water called for by a water deed, resulting in injury to fruit trees, the proper measure of damages is the difference between the value of the growing trees had water been furnished and their value without the water, limiting the damages to such injuries as were occasioned by lack of water.

Appeal from a judgment of the superior court for Spokane county, Pendergast, J., entered December 28, 1914, sustain-

¹Reported in 154 Pac. 800.

ing an objection to the admission of evidence, dismissing an action on contract. Reversed.

Munter & Flood, for appellant.

Cullen, Lee & Matthews, for respondent.

MORRIS, C. J.—Appeal from a judgment of dismissal based upon the insufficiency of the complaint. The complaint recited, that, in March 1909, respondent sold to one Grant two hundred acres of land, together with a perpetual water right to the use of certain water for irrigation purposes during the period from May 15 to September 1 of each year, from canals, ditches, flumes or pipe lines to be constructed by respondent, which would deliver the water at the highest point of the granted land; that the grantee subsequently sold twenty acres of this land to appellant, together with a proportionate share of the perpetual water right as specified in the deed to Grant; that appellant went into possession of his land in 1910, purchased and planted a large number of fruit trees, but that respondent failed and neglected to furnish water as specified in the Grant deed, and had so failed up to May 1, 1913; that appellant was unable to procure water elsewhere; and that, by reason of respondent's failure to comply with the terms of its contract in the furnishing of water, he lost many of his fruit trees, and others were greatly damaged. It is then alleged that, with water, the land was worth \$400 per acre; without water, not to exceed \$85; and appellant's damage was consequently fixed at \$6,300, for which judgment was demanded. Issues were joined, and a jury impaneled to try the same, when respondent objected to the admission of evidence upon the ground that the complaint was insufficient. This objection was sustained, and appellant refusing to further plead, the cause was dismissed.

No time seems to have been fixed within which the water was to be furnished; but inasmuch as the deed clearly calls for a supply of water, the law fixes the time as a reasonable

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time, considering the facts within the contemplation of the parties at the time the contract was entered into, and what would be a reasonable time would be one of the ultimate facts to be determined.

It is apparent that appellant has misconceived the measure of his damages in seeking to recover the difference between the value of the land with and without water, but this does not call for a dismissal of the action. It is not essential to the statement of a good cause of action that the complaint should set out a proper measure of damages, since that is a question of law to be determined by the court in instructing the jury, or in the conclusions of law if tried without a jury. If the appellant sufficiently stated a contract, its breach and proximate injury, he stated a cause of action, irrespective of what the pleader conceived to be the proper measure of damages. *Wetmore v. Porter*, 92 N. Y. 76; *St. Louis Southwestern R. Co. v. Jenkins* (Tex. Civ. App.), 89 S. W. 1106; *Norton v. Kull*, 74 Misc. Rep. 476, 132 N. Y. Supp. 387; *Weller v. Missouri Lumber & Mining Co.*, 176 Mo. App. 243, 161 S. W. 853; *Ara v. Rutland* (Tex. Civ. App.), 172 S. W. 993.

The proper measure of damages in the breach of a contract is the proximate injury. In this case the pleader alleged that proximate injury to be the destruction of a number of his fruit trees and damage to others. The measure of damages then would be the difference between the value of his growing trees had water been furnished within a reasonable time according to the terms of the contract and the value of the trees without water; bearing in mind, of course, all the elements which enter into the growth of fruit trees, and limiting the damages to such injuries only as were occasioned by lack of water. *Hanes v. Idaho Irrigation Co.*, 21 Idaho 512, 122 Pac. 859; 3 Kinney, Irrigation & Water Rights, p. 3139.

Reversed and remanded for new trial.

FULLERTON, MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12885. Department Two. January 28, 1916.]

HARRY FOLMSBEE *et al.*, *Appellants*, v. WILLIAM E. DANIELL
et al., *Respondents*.¹

APPEAL—REVIEW—FINDINGS. A finding upon conflicting evidence, in an action at law tried to the court, will not be reversed on appeal where there is no preponderance of the evidence against it.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered November 11, 1913, upon findings in favor of the defendants, in an action in tort. Affirmed.

Geo. S. Lee and *Smith & Gresham*, for appellants.

Chas. A. Johnson, for respondents.

BAUSMAN, J.—Action in deceit for damages, tried without a jury. The real question here is whether an erased clause was stricken from a contract before it was signed. The appellants claim that it was not. Upon this, the sole point that we find it necessary to review, the lower court made an express finding against them.

There being conflicting evidence and no preponderance against this finding, our decision is controlled by our own numerous and recent utterances.

We shall not review the finding, and the judgment is affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

¹Reported in 154 Pac. 796.

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[No. 12916. Department One. January 28, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. ISAAC BROOKS,
Appellant.¹

WITNESSES — PRIVILEGE — ACCUSED AS WITNESS — CROSS-EXAMINATION. Where the accused takes the stand in his own defense, he is subject to all the rules of law relating to the cross-examination of other witnesses.

CRIMINAL LAW—TRIAL—WITNESSES — CREDIBILITY — QUESTION FOR JURY. The credibility and mentality of the prosecuting witness, who positively identified the accused, is a question for the jury, notwithstanding that he was a moral pervert and associated with disreputable persons, where those matters were fully gone into at the trial.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly denied where it merely related to the credibility of the prosecuting witness, which had been fully gone into at the trial, and was simply cumulative upon that point.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered May 5, 1914, upon a trial and conviction of a criminal offense. Affirmed.

William M. Thompson, for appellant.

Harold B. Gilbert, for respondent.

MOUNT, J.—The appellant was convicted of the crime of castrating the prosecuting witness. He appeals from that judgment.

While a number of errors are assigned, the argument is based upon three contentions, as follows: First, that the appellant did not have a fair trial; second, that the evidence is not sufficient to sustain the conviction; and third, that the court erred in denying the motion for a new trial. We shall notice these contentions briefly.

It is argued, first, that the court erred in allowing the prosecuting attorney, upon cross-examination, to inquire the names of associates of the appellant, and statements made by

¹Reported in 154 Pac. 795.

him upon different occasions relating to castration, and questions of that character. We shall not set out these statements because of their disgusting character. It is sufficient to say that, when a defendant voluntarily goes upon the stand in his own behalf, he is subject to all the rules of law relating to cross-examination of other witnesses. *State v. Morden*, 87 Wash. 465, 151 Pac. 832. We are satisfied that the cross-examination in this case was within the rule there announced.

Second: The principal contention of the appellant is that the evidence is insufficient to sustain a conviction, because the appellant was not sufficiently identified as one of three persons who assisted in the castration of the prosecuting witness. The prosecuting witness went upon the stand and positively identified the appellant as one of the men who held him while another assisted in holding him, and another used a knife upon the prosecuting witness. The appellant argues that, because the fact that the prosecuting witness was shown to be a moral pervert, and that he associated with disreputable characters, and because of his mentality, he was unworthy of belief. The question of the mentality of the prosecuting witness, the character of his associates, his disgusting habits, and all these things, were fully gone into at the trial of the case; so that the credibility of the witness was for the jury to determine. After considering all the evidence in the case, and being properly instructed upon the question, the jury found beyond a reasonable doubt that the accused was one of the men who assisted in the forcible castration of the prosecuting witness. We think, under all the evidence, that the question of the credibility of the witness was clearly for the jury. It is not for this court, after a jury and the trial court have passed upon questions of fact of this kind, to determine otherwise.

It is finally argued that the court erred in denying the motion for a new trial upon the ground of newly discovered evidence. There is a showing upon that motion to the effect that, after the trial, the prosecuting witness had threatened

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to do counsel for the appellant bodily injury. There is also a showing by affidavits to the effect that certain persons believed the prosecuting witness to be unsound mentally; and an affidavit to the effect that, after the trial, the prosecuting witness was mistaken in the identity of an officer who had arrested him at one time. This is claimed to be newly discovered evidence upon which the trial court should have granted a new trial. The question of the mentality of the prosecuting witness, and the question of his credibility, were fully gone into at the trial. The showing made, we think, amounts to the same thing as was gone into upon the trial. It is simply cumulative; and we think it is insufficient to justify us in reversing the lower court.

We find no prejudicial error. The judgment must therefore be affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 12923. Department Two. January 28, 1916.]

W. S. WOODY, *Respondent*, v. E. E. WAGNER *et al.*,
Appellants.¹

CROPS—GROWING CROPS—CONVEYANCE OF LAND. The title to unsevered crops passes to the purchaser of the land upon transfer of the title to the land.

LANDLORD AND TENANT—GROWING CROPS—LEASE—TERMINATION. A cropping lease requiring surrender and delivery of possession upon a sale and the payment to the tenant of the value of growing crops, is terminated by such sale and demand for possession, with offer to credit the value of the crop.

CHATTEL MORTGAGES—GROWING CROPS—LEASED LANDS—TERMINATION OF LEASE—PRIORITIES. A chattel mortgage upon a growing crop is subject to the express terms of the lease providing for its termination upon a sale of the land and payment to the tenant of the value of the crop; and upon termination of the lease pursuant to its terms, prior to severance of the crop, the crop passes to the purchaser, and neither the lessor nor the purchaser would be liable for the deficiency judgment against the lessee giving the mortgage on the crop.

¹Reported in 154 Pac. 819.

Appeal from a judgment of the superior court for Adams county, Mills, J., entered November 30, 1914, in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Reversed.

G. E. Lovell, for appellants.

Adams & Naef, for respondent.

PARKER, J.—The plaintiff, W. S. Woody, commenced this action in the superior court for Adams county, seeking foreclosure of a chattel mortgage given to him by Julius Conner upon certain live stock, farming implements, and two-thirds of a crop of wheat, seeded in the fall of 1913 upon land occupied by him under a lease from the defendant E. E. Wagner, the owner thereof, which land was thereafter conveyed to the defendant A. A. Neufelt. The case being tried and submitted upon the merits, on November 24, 1914, the superior court rendered a personal judgment against the defendant Conner for the full amount of the debt secured by the mortgage, decreed foreclosure and sale of all the mortgaged property excepting the crop of wheat, and rendered a personal deficiency judgment against the defendant Wagner, evidently because of the appropriation of the crop upon its maturity by him and Neufelt, his grantee. From this disposition of the cause, the defendants Wagner and Neufelt have appealed to this court, claiming that the wheat was lawfully appropriated by them without any obligation to account therefor to any one.

The cause comes to us upon conceded facts, which may be summarized as follows: Appellant Wagner, being the owner of the land upon which the wheat was seeded and grown, leased the same to Conner for the term of six years, commencing January 1, 1913. By the terms of the lease, Conner was to pay Wagner as rent for the land one-third of the crops to be grown thereon. The lease contained, among other provisions, the following:

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"It being understood that this land is being offered for sale, it is agreed that if the sale of the land is made and the purchaser demanding immediate possession, this lease may be declared void and of no effect by said lessor giving notice of such sale, and paying said lessee a reasonable price (not exceeding \$2 per acre) for all labor expended in preparing any ground not in crops, and on further payment of the value of any crops which may be growing or immatured."

Conner went into possession of the land. He seeded it to wheat in the fall of 1913 for the crop of 1914. On October 14, 1913, Wagner, having sold and conveyed the land to Neufelt, caused to be served upon Conner two notices as follows:

"You are hereby notified, that I have sold all of . . . [describing the land] to A. A. Neufelt, and under the terms of the lease, you will be required to give possession of the said premises to the said A. A. Neufelt within ten days from the receipt of this notice. All sums due you will be endorsed on the notes which you gave me and which I now hold.

"Dated this 14th day of October, 1913.

"E. E. Wagner."

"You are hereby notified, that I have purchased the . . . [describing the land], and under the terms of purchase I hereby demand immediate possession of the above described lands.

"Dated this 14th day of October, 1913.

"A. A. Neufelt."

On October 24, 1913, Conner, being indebted to Woody in the sum of \$1,629, executed and delivered to Woody a chattel mortgage upon certain live stock, farming implements, and two-thirds of the crop of wheat which he had seeded upon the land shortly prior thereto. This chattel mortgage was duly filed for record, and Wagner had actual knowledge thereof prior to November 1, 1913.

On October 25, 1913, Wagner and Conner, being unable to agree upon the amount due Conner under the terms of the lease above quoted, because of the sale of the land to

Neufelt and the termination of the lease, Wagner and Neufelt commenced an action in the superior court for Adams county for possession of the land, and to have determined the amount due to Conner for which he should be credited upon the indebtedness due from him to Wagner because of the termination of the lease. That case was tried, and in April, 1914, judgment rendered therein by the superior court, determining the amount Conner was entitled to because of the sale of the land to Neufelt and the termination of the lease. Thereupon, in compliance with the judgment so rendered, Wagner delivered to Conner certain notes evidencing indebtedness due from Conner, and also paid Conner the additional sum of \$65.75, thereby fully complying with the terms of the judgment and fully paying all sums due Conner because of the sale of the land and the termination of the lease. Neufelt has been in possession of the land at all times since the rendering and satisfaction of that judgment. In the summer and fall of 1914, Neufelt harvested, hauled to market, and sold the whole of the crop of wheat which had been seeded by Conner in the fall of 1913 while in possession of the land under the lease.

We are unable to see any sound legal grounds upon which the personal judgment rendered by the court against Wagner can be rested. When he sold and conveyed the land to Neufelt, gave Conner notice thereof, demanded possession of the land and paid to Conner all sums due to Conner because of the cancellation of the lease, he became entitled to the land and all growing unsevered crops thereon. All of this occurred long before the maturity and harvesting of the crops. That it occurred after the giving of the chattel mortgage upon the crop by Conner does not militate against the title to the crop acquired by Wagner and Neufelt upon the sale of the land to Neufelt and the termination of the lease. Manifestly the mortgage rights of Woody were subject to the terms of the lease and were liable to be defeated by its termination, under the provisions thereof above quoted.

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The passing of unsevered crops with the title to land upon transfer of title thereof is elementary law. It is so when the transfer is by an ordinary deed of conveyance executed by one having perfect title to the land. The rule is stated in the text of 12 Cyc. 977 as follows:

“According to the great weight of authority crops so far partake of the nature of realty that in the absence of reservation or exception they pass by a sale or conveyance of the land as appurtenant thereto, whether unripe or matured, so long as there has not been a severance, actual or constructive, of such crops from the land.”

See, also, 8 R. C. L. 358.

It is so when the title passes by sale under a foreclosure of a mortgage upon the land, when the mortgagor is the owner and his title to the crop is not impaired by some leasehold or contractual interest in some other person. *Jones v. Adams*, 37 Ore. 473, 59 Pac. 811, 62 Pac. 16, 82 Am. St. 766, 50 L. R. A. 388; *Reily v. Carter*, 75 Miss. 798, 23 South. 435, 65 Am. St. 621; *McMaster v. Emerson*, 109 Iowa 284, 80 N. W. 389; 8 Ballard, Real Property, § 101. It is so when the title of a lessee passes back to the lessor by forfeiture of the leasehold interest, and it has been held that the voluntary surrender of the leasehold interest to the lessor carries title to unsevered crops even as against a mortgagee of such crop. This latter holding, however, has no application here, since Conner's leasehold interest in the land and the unsevered crop passed back to Wagner, the lessor and owner of the land, by the termination of the lease in pursuance of its express terms. 24 Cyc. 1071; *Gregg v. Boyd*, 69 Hun 588, 23 N. Y. Supp. 918; *Gammon v. Bull*, 86 Iowa 754, 53 N. W. 340.

Counsel for Woody seem to proceed upon the theory that Wagner and Neufelt have unlawfully appropriated the crop as against Woody, the mortgagee thereof. We have seen that Wagner and Neufelt acquired possession of the land and caused termination of the lease by paying to Conner all

he was entitled to under the terms thereof, long before the crop was matured or severed from the soil. Now Conner's title to the crop was at all times, until it was actually severed from the soil, subject to acquisition by Wagner and his grantee under the express terms of the lease. It seems quite clear to us that the giving of the mortgage by Conner to Woody could not in the least curtail this right of Wagner and his grantee, nor were they required to pay any attention to the rights of Woody as mortgagee. They were not garnisheed, nor did they hold anything in trust for Woody as mortgagee. What they did was in strict compliance with the terms of the lease under which Conner at all times held the land, and subject to which Woody took his mortgage on the crop.

The judgment against appellant E. E. Wagner is reversed. The record before us does not show the rendering of any judgment, in terms, against appellant A. A. Neufelt; but in so far as the decree and judgment might be construed as rendering Neufelt liable to any extent, it is reversed.

MORRIS, C. J., BAUSMAN, MAIN, and CHADWICK, JJ., concur.

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[No. 12926. Department One. January 28, 1916.]

H. F. LOUTZENHISER, *Respondent*, v. HUGH PECK *et al.*,
Appellants.¹

CONTRACTS—VALIDITY—LEGALITY OF OBJECT—RESTRAINT OF TRADE—TIME. A covenant in a bill of sale not to engage in the retail meat business within a limited locality, for not less than two years, is an agreement not to engage in such business for two years after the date of the contract; and hence is not invalid as being without limitation as to time.

HUSBAND AND WIFE—CONTRACTS OF HUSBAND—SEPARATE ESTATE—BREACH—EFFECT ON COMMUNITY—CONSIDERATION—INJUNCTION—WIFE WHEN BOUND. Upon the sale by a husband of his separate business, a covenant not to engage in the same business in a limited locality for a limited time is binding upon the community, and precludes him from making a gift to his wife of his separate estate and setting her up in such business; the fact that he was supporting the community from the business sold constituting a sufficient consideration to the community, so that the community, himself, and his wife could be enjoined from entering upon the same business with the husband's separate funds.

INJUNCTION—ACTIONS—RELIEF—DAMAGES—PLEADING—COMPLAINT—SUFFICIENCY. In an action for an injunction, the objection that the amount of damages was not stated in the complaint as required by Rem. & Bal. Code, § 258, cannot be urged at the trial, in the absence of demurrer or motion, where the complaint alleged the facts from which the damages flowed and that the same could not be estimated, and prayed that they be determined and for general relief.

DAMAGES—BREACH OF CONTRACT—CONTRACTS—CERTAINTY—EVIDENCE—SUFFICIENCY. A loss of profits in a retail meat business in a suburban district is shown with sufficient certainty by evidence that, after defendant opened his shop in the same locality contrary to his covenant, he took in twenty to twenty-five dollars a day, the plaintiff's business fell off to about the same extent, and that the profits in the business generally amount to from twenty to twenty-five per cent of the gross sales.

DAMAGES—BREACH OF CONTRACT—LOSS OF BUSINESS—PROFITS—EVIDENCE—ADMISSIBILITY. Where the vendor of an established retail meat business in a suburban district covenanted not to engage in the same business within one mile of the location for the period of two years, loss of profits reasonably ascertainable may be recovered

¹Reported in 154 Pac. 814.

as damages within the contemplation of the parties; and evidence relating to the business done is admissible as the best evidence of damages of which the nature of the case was susceptible.

HUSBAND AND WIFE—CONTRACTS—SEPARATE CONTRACT OF HUSBAND —BREACH — INJUNCTION — DAMAGES — LIABILITY OF COMMUNITY AND WIFE. Where a husband sold his separate business from which he supported the community, covenanting not to engage in the same business within a limited locality for a limited time, and set his wife up in the same business with his separate funds, he and the community consisting of himself and wife are liable for breach of the covenant; but his wife is not separately liable for the damages, although she may be enjoined from engaging in the business with separate funds of the husband given to her for that purpose.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 19, 1915, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Modified.

Carl W. Swanson, for appellants.

Don F. Kizer, for respondent.

ELLIS, J.—Action to enjoin the violation of a covenant not to engage in a certain business for a limited time in a limited locality, and for damages. It is conceded that, prior to July 1, 1913, both the plaintiff and the defendant Hugh Peck were engaged in the retail meat business, on Monroe street, at Nos. 02717 and 02721, respectively, in the city of Spokane; that on that date, Hugh Peck sold his stock, tools and fixtures to the plaintiff, and executed a bill of sale thereof containing a covenant as follows:

“Party of the first part hereto hereby agrees not to engage in the retail meat business as owner, manager or clerk within one mile of New York Market at 02721 Monroe street, Spokane, Spokane county, Washington, for not less than two years.”

It is conceded that the defendant Hugh Peck, prior to the sale, had been supporting his family from the business so sold. The defendant Katherine Peck avers in her answer

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that, about January 1, 1914, her husband conveyed to her, by bill of sale, certain fixtures, tools and implements for running a meat market at 02721 Monroe street; that the conveyance to her was a gift from her husband, the defendant Hugh Peck; that the property was thereafter her separate property; and that since that time she has been conducting, either personally or through a renter, a retail meat market at that place. The defendant husband testified that he purchased the fixtures and equipped the new market with his separate funds and gave it to his wife. The evidence further shows that he purchased the market sold to the plaintiff with funds acquired prior to his marriage.

The court made findings of fact and conclusions of law in favor of the plaintiff, and thereon entered a decree enjoining the defendants and each of them from engaging in the retail meat business within one mile of 02721 Monroe street, in Spokane, for a period of two years from July 1, 1913, and awarding the plaintiff judgment against the defendants and each of them for the sum of \$350 and costs. The defendants have appealed.

The appellants' first claim is that the covenant was invalid, in that it was without limitation as to when the two years should begin or cease. Construing the contract as a whole, the covenant is not even ambiguous. No one reading the contract could have a doubt as to what was meant. It shows an intention, by clear implication, not to engage in the specified business within the specified limits within the period of at least two years from the date of the contract. The intention of the parties as expressed or reasonably implied in a written contract must prevail.

The appellants next complain that both the injunction and the judgment, if any, should have been against the defendant husband alone, because the sale in connection with which the covenant was made was a sale of his separate property. Though the property sold was the property of the husband, it is conceded that it was being used in support of the com-

munity. This fact furnished a sufficient consideration for an undertaking, binding upon the community, not to enter into the same business, at least upon the same capital, for a limited time in the same locality. Stating it in another way, the husband could not avoid the covenant, even conceding it his separate covenant, by turning his property over to his wife as a gift and setting her up in the same business at the same place. To permit him to do so would be to sanction the use of his own property in fraud of the respondent's rights and in palpable evasion of his own covenant. Looking through technicalities to essentials, that is the ultimate end of appellants' position. It is unsound. The court committed no error on the admitted facts in running the injunction against the appellant Hugh Peck and the community. It is equally clear that, under the evidence, there is no error in enjoining the wife also. She was aiding the husband in violating his covenant. A different case would be presented if there had been any evidence that she invested in the new venture money from any other source than the alleged gift from her husband. On such a case, we express no opinion.

It is asserted that the complaint was insufficient to sustain any judgment for damages, in that it contained no allegation of any specific amount of damages suffered, as required by Rem. & Bal. Code, § 258, subd. 3 (P. C. 81 § 223), the last clause of which reads:

"If the recovery of money or damages be demanded, the amount thereof shall be stated."

The claim is untenable. In the complaint it is alleged, in substance, that the ultimate damages cannot be estimated, and the prayer is for an injunction and that the damages already suffered be ascertained and allowed, and for such other relief as may be consistent with equity and good conscience. All the facts from which the damages flowed were pleaded. The appellants were advised of the exact nature of the recovery sought. No demurrer was interposed nor

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any motion to make the complaint more specific. On tardy objection, every intendment will be indulged in favor of the pleading. Substantial justice is the criterion imposed by statute. Rem. & Bal. Code, §§ 285, 307 (P. C. 81 §§ 259, 303). This is specially true where, as here, the action is one of equitable cognizance. In such a case, under a prayer for general relief, the court is justified in granting any relief consistent with the equities of the case sustained by the facts alleged and proved. *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123. This even though the prayer for special relief be defective. *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 928; *Dormitzer v. German Savings & Loan Soc.*, 23 Wash. 132, 62 Pac. 862.

It is stoutly urged that no damages were proven. It was shown by a comparison of respondent's sales for the months of August, September, October and November in the year 1913, with his sales for the same months for the year 1914, that the former exceeded the latter in the sum of \$2,409.40. Respondent testified that about the same ratio of loss prevailed during the other months of the year 1914 after appellants reopened their market. There is also evidence that the appellants were taking in from \$20 to \$25 a day after they reopened their market. This would more than equal the falling off of respondent's trade at the same time. This coincidence in a suburban district such as this, where the public to which the markets catered was necessarily limited, had a strong tendency to show that the one was the result of the other. There was evidence that the profits of retail meat markets generally amount to from twenty to twenty-five per cent of the gross sales. No evidence was offered to the contrary. The loss of profits so computed, even in the four months mentioned, would much exceed the amount of damages awarded by the court. But it was also shown that there was a general decline in the retail meat business in Spokane during the year 1914. The court evidently, and we think properly, took this into consideration. Considered

as a whole, the evidence fairly, and with as much certainty as can usually be attained, established a loss of profits due to the appellant's violation of the covenant in an amount at least equal to the damages awarded.

It is now generally held that lost profits when reasonably ascertainable are recoverable as damages for breach of contract, whenever from the nature of the case they were reasonably within contemplation of the parties as the probable result of its breach when the contract was made. An established business is not a commodity with a fixed market value. It is an investment for the purpose of producing profits. Both the vendor of such a business who covenants not to enter into competition for a given time and in a given locality and the vendee who, as the evidence here shows, pays more for the business because of the covenant, must certainly contemplate at the time, that a breach of the covenant will result in damages by causing a loss of profits. The evidence adduced was the best evidence of the damages of which the case in its nature was susceptible. Such evidence is always admissible. For a decision in a case closely analogous so holding, see *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842. In *Hitchcock v. Anthony*, 83 Fed. 779, another cognate case, Judge Lurton, in a well considered opinion touching evidence of the same character as that here assailed, said:

"The evidence offered was relevant and competent. It related directly to the business conducted by Anthony both before and after the contract, and before and after its breach, and did not touch any mere collateral business or anticipated collateral profit. The admission of evidence as to the past profits of that business as bearing upon future profits prevented was not error. It was a most important circumstance, which any business man would look to as a factor in any estimate of the future value of a business; and no reason occurs why a jury may not equally as well look to that element in considering whether there were any profits prevented by competition."

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As said by the supreme court of New Hampshire in *Salinger v. Salinger*, 69 N. H. 589, 45 Atl. 558:

“During the term of the contract, each day of the defendant’s competition constituted a continuing wrong done to the plaintiffs. Their rights were constantly violated, and in such a way that the ensuing loss of profits must have been contemplated by the parties. The plaintiffs are to be compensated for all such damages, if they are capable of computation. *Hurd v. Dunsmore*, 63 N. H. 171, 173, and cases cited; *Crawford v. Parsons*, 63 N. H. 438, 444. That it cannot be demonstrated to a mathematical certainty what profits have or have not come from a certain source of business, is no objection to their recovery.”

Finally, it is claimed that no personal judgment should have been entered as against the defendant Katherine Peck binding her separate estate. This contention must be sustained. She was not a party to the contract. Though the circumstances were such as to warrant an injunction against both members of the community personally and as a community, and to warrant a judgment for damages against the defendant husband and the community, there was no evidence warranting a judgment against the wife.

The cause is remanded with direction to modify the judgment in accordance with this opinion. Appellant Katherine Peck may recover her costs in this court.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 12435. *En Banc*. February 2, 1916.]

D. C. BONTHUIS *et al.*, *Respondents*, v. GREAT NORTHERN
RAILWAY COMPANY, *Appellant*.¹

WATERS AND WATER COURSES—DAMAGES—OBSTRUCTIONS—EVIDENCE—SUFFICIENCY. A recovery for obstructing a stream and overflowing plaintiffs' lands is not sustained by the burden of proof, and should be set aside, where the plaintiffs' evidence of an alleged dam caused by defendant's accumulation of debris is very vague, no witnesses actually saw the dam during the overflow at high water, the debris collected after the water went down was not the result of defendant's operations, and defendant's evidence was to the effect that no debris was placed in the water by defendant, or collected to cause the overflow, but that the overflow was the natural result of floods.

Appeal from a judgment of the superior court for Lincoln county, McCroskey, J., entered November 6, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed.

Charles S. Albert and Thomas Balmer, for appellant.

BAUSMAN, J.—Defendant's railway goes through plaintiffs' land parallel to Crab creek. When floods raise the water to a certain old bed which is dry most of the year, the creek flows through this also, rejoining the main stream in a loop crossed by the tracks upon two trestles. The trestle at the upper or receiving mouth of this dry bed being washed away by a flood in 1909, the company rebuilt it with a broader span. In 1910, there was another flood, and this did much mischief within the loop to the land of plaintiffs, who lay it to the widening of the span and also to some clearing done by defendant.

Now the unruly stream not only overflows at every flood the entire neighborhood, but it damaged this land in 1909 through the same bed and trestle. Two things are plain: not only had plaintiffs' land been flooded through this bed

¹Reported in 154 Pac. 789.

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before the building of the railway, but it was not saved by the railway embankment in 1909. So far, then, as the grievance is the rebuilding of this trestle with its wider span, we have here no deflecting of surface waters, but only a going back to original exposure.

Plaintiffs contend that, at least, in clearing its right of way farther up, the company damaged them, because the clearing let the flood down too rapidly into the dry bed. It seems that, after the flood of 1909 and before this of 1910, the company cut down much growth of saplings and bushes along the main creek above the intake of the dry bed, and plaintiffs say that the debris was negligently allowed to float down, dam the main creek opposite the intake, and aggravate the inflow during the flood.

Here is a possible grievance in law were it one in fact, but the grievance is ill-proved. To begin with, the worst thing the company could do as to itself, after its experience in 1909, was to dam the creek at this point. It is consequently improbable, and should be clearly proved. Its workmen testified not only that no such dam accumulated, but that the saplings and bushes had been burned as they cut them. As for plaintiffs' witnesses, they are on this point exceedingly vague. The dam they describe is composed of such debris as is common after riot and overflow in any waters, and does not resemble the growth that was cut. But more, they do not say that they actually saw any dam during the flood. What they assert is that they saw this debris stretched across the main channel after the waters went out.

Plaintiffs have not assisted the court by brief or argument, and we can find nothing to sustain their judgment, so defendant's challenge to the evidence should have been sustained. Without deciding, if it were possible to pronounce a general rule, what constitutes an unfair manner of turning surface waters off one's own land to a neighbor's, it is clear that there has been no unfairness shown here. The burden in this respect was on plaintiffs, for the company has a pri-

mary right, under familiar decisions of this court, to hurry the outflow of surface waters from its property. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; *Harvey v. Northern Pac. R. Co.*, 63 Wash. 669, 116 Pac. 464.

Let the case be remanded and the action dismissed.

All concur.

[No. 12804. Department Two. February 2, 1916.]

NETTIE WOODWORTH, *Respondent*, v. THE CITY OF DAYTON,
Appellant.¹

MUNICIPAL CORPORATIONS — STREETS — INJURY TO TRAVELER — OBSTRUCTIONS—PROXIMATE CAUSE — EVIDENCE — SUFFICIENCY. Whether the negligence of the city, in leaving a pile of gravel and building stone near the center of a road without lights at night, was the proximate cause of plaintiff's injuries, when she was thrown from her horse onto the pile, does not rest entirely in speculation or conjecture, and is a question for the jury, where witnesses heard the horse's feet strike the gravel or stone and plaintiff's simultaneous outcry, and immediately afterwards found her unconscious on the pile, in such a position as to indicate almost positively that the horse had stumbled on the pile or suddenly turned so as to throw the plaintiff off.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered November 30, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through an obstruction in a street. Affirmed.

Leon B. Kenworthy, for appellant.

R. M. Sturdevant and *Will H. Fouts*, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff alleges she suffered as the result of the negligence of the city. Trial before the su-

¹Reported in 154 Pac. 790.

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Opinion Per PARKER, J.

perior court with a jury resulted in verdict and judgment in favor of the plaintiff, from which the city has appealed to this court. The only question here presented is as to the sufficiency of the evidence to sustain the verdict and judgment, which question was presented to the superior court during the course of and at the conclusion of the trial by appropriate motion made in the city's behalf, and overruled by the trial court.

There was introduced upon the trial evidence sufficient to warrant the jury in believing the following: For some time prior to and after the 16th day of July, 1914, the city suffered a pile of building stone and gravel, which was being used for concrete and masonry work, to be and remain upon a considerable portion of Patit avenue. This stone and gravel obstructed the roadway portion of the avenue used by horses and vehicles, to a considerable extent, so that it was necessary for such travel to pass around the obstruction close to the parking on one side. No warning lights of any nature were maintained showing the location of the obstruction. The ordinary street lights did not show its location or existence, and it was not discoverable after dark, except upon close inspection. It was some two to two and one-half feet high, and extended somewhat more than half way across the traveled portion of the roadway.

About nine-thirty o'clock of the evening of July 16th, respondent was riding horseback along the avenue on the usually traveled portion of the roadway, towards this obstruction, ignorant of its existence. It was then dark. She was not riding recklessly as to speed or otherwise, though apparently riding faster than a walk. On suddenly coming to the obstruction, she was thrown from the horse onto or near the pile and severely injured. It happened so suddenly, and she being rendered unconscious at the time, she was thereafter unable to assign any positive cause therefor. Other witnesses plainly heard her horse's feet strike the

gravel or stone and her outcry at almost the same instant. She and her horse were immediately thereafter found in such positions relative to the pile as to indicate that the horse had, upon reaching the pile, either stumbled upon it or suddenly stopped and turned to the right in such manner as to throw her forward and somewhat to the left, upon or near the extreme outer end of the pile, the pile being on the right side of the roadway as she was traveling, and obstructing the roadway to a point somewhat beyond the middle thereof. The jury viewed the location and, by consent of the parties, the location of the obstruction was pointed out to the jury by a witness who was familiar with it.

There is no contention made that the city was not negligent in so suffering this obstruction to be maintained in the avenue, nor that respondent was guilty of contributory negligence. But the real contention made in behalf of the city is that the evidence does not show that its negligence was the proximate cause of the injuries received by respondent, and that the conclusion reached by the jury has no basis other than speculation and conjecture. While it must be conceded that the evidence does not present a very clear case against the city as to its negligence being the proximate cause of respondent's injuries, we nevertheless think that there is reasonable ground, in the light of the facts we have noticed, for difference of opinion upon this question. While there are other possible theories of the case compatible with the city's negligence not being the proximate cause, upon the whole evidence the jury might well believe that it appeared more probable that respondent's injuries came from the city's negligence, that is, that the obstruction caused the horse to stumble or suddenly stop and turn to the right throwing respondent off, than from any other cause. We think, therefore, that the cause was properly left to the jury for decision. Observations made in the following decisions are in harmony with this conclusion. *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016; *Jensen v. Shaw Show*

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Case Co., 76 Wash. 419, 136 Pac. 698; *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343.

The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12843½. Department Two. February 2, 1916.]

PETER LARSEN *et al.*, *Respondents*, v. STANDARD RAILWAY & TIMBER COMPANY *et al.*, *Appellants*.¹

FIRES—NEGLIGENCE—CAUSE OF FIRE—EVIDENCE—SUFFICIENCY—CONJECTURE. A recovery for the loss of timber alleged to have been communicated from a railroad fire on defendants' lands cannot be sustained, where the year in which the fire occurred on plaintiffs' lands rests entirely in conjecture, and in the same year of the railroad fire, other fires, not traced to that fire, broke out in the district on lands other than the defendants', and the fire on defendants' lands was not traced to the plaintiffs' lands.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered December 16, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property destroyed by fire. Reversed.

J. A. Coleman and *James M. Hogan*, for appellants.

A. M. Wendell, *Cooley & Horan*, and *R. Mulvihill*, for respondents.

BAUSMAN, J.—Action for damages, tried before a jury on a complaint alleging that a fire, negligently started in defendants' timber by one of their own locomotives, had caused another fire in that of plaintiffs. Defendants unsuccessfully challenged the sufficiency of the evidence, and now complain of the court's ruling upon that, as well as of certain instructions to the jury, which gave plaintiffs a verdict.

¹Reported in 154 Pac. 790.

The challenge to the evidence should have been sustained. The fire on defendants' land occurred two years before this suit was brought, and not one person swears as to when the fire occurred on plaintiffs'. The most to that effect is that a fire had previously occurred there. But, when? Plaintiff himself was not on his lands, he admits, between 1908 and 1913. All he could state was that the scars of a fire, subsequently discovered on defendants' lands, pointed toward his own, which is the most that is testified to by anybody else. That a fire did occur on defendants' lands in May, 1912, is admitted, and had the burning on plaintiffs' been shown to be simultaneous or close upon that, then, under our rule in this class of cases, the concomitant events could have been submitted to the jury as affording reasonable ground of conjecture. *Northwestern Mut. Fire Ass'n v. Northern Pac. R. Co.*, 68 Wash. 292, 123 Pac. 468, Ann. Cas. 1913 E. 968; *Asplund v. Great Northern R. Co.*, 63 Wash. 164, 114 Pac. 1043; *North Bend Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.*, 76 Wash. 232, 135 Pac. 1017.

While that rule permits a degree of conjecture, it cannot be carried to all limits. It should not be extended to the vague situation here, where no one so much as fixes the year of plaintiffs' damage. Moreover, in May, 1912, other fires, not traced to the one started in the timber of defendants, broke out in that district on lands other than those of defendants. Nor did plaintiffs' land adjoin that of defendants. There was even testimony to show that defendants' fire could not have reached plaintiffs' tract, because there remains unburnt timber between. Summed up, the consequence alleged here lacks identity in date, connection in area, and exclusion of other causes. Conjecture was sought to be piled upon conjecture.

For the foregoing reasons, the judgment must be reversed and the cause remanded with instructions to dismiss.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

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Statement of Case.

[No. 12855. Department Two. February 2, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN HAWKINS,
Appellant.¹

HOMICIDE—MALICE—“PREMEDITATED DESIGN”—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. A conviction of second degree murder is sufficiently supported by evidence of malice or “premeditated design to effect the death,” within Rem. & Bal. Code, § 2392, where defendant started an affray by rushing up to the deceased and others and charged someone with cutting his hog, and on this being denied, with lying, and after being struck by the deceased, drew or produced a revolver which he might have had concealed in his hand, and shot the deceased while deceased was retreating after being requested by deceased and another not to shoot, and shot again and killed the deceased while others were trying to disarm him; especially in view of the rule that, the killing being admitted, the burden of justifying the act or reducing the crime to manslaughter is upon the accused.

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS—REQUESTS—NECESSITY—HOMICIDE. Upon a prosecution for homicide, an instruction admittedly correct as far as it goes upon the subject of the deceased's first attack and retreat, cannot be complained of as failing to state all that accused was entitled to on the subject of self-defense and defendant's knowledge of the retreat, where no request was made for any instruction of that nature.

HOMICIDE—SELF-DEFENSE—PROVOKING ASSAULT—FAILURE TO DESIST. One who starts a fatal affray by conduct provoking an assault, and was struck, is not justified in shooting his assailant in self-defense, after his assailant had retreated and he was requested not to shoot, and where he afterwards fired again and killed the deceased while being disarmed by others; as it was his duty to retreat or at least desist.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered February 24, 1915, upon a trial and conviction of murder in the second degree. Affirmed.

Charles R. Hill, for appellant.

R. M. Burgunder and *Thomas Neill*, for respondent.

¹Reported in 154 Pac. 827.

PARKER, J.—The defendant, John Hawkins, was charged, by information filed in the superior court for Whitman county, with the crime of murder in the first degree, in that he did, on the 29th day of November, 1914, “feloniously and with premeditated design to effect the death of one George A. Miller, kill and murder said George A. Miller.” His trial before the court and a jury resulted in a verdict of guilty of murder in the second degree against him. Judgment was rendered thereon sentencing the defendant to the penitentiary, from which judgment he has appealed to this court.

Appellant and deceased were neighboring farmers living in Whitman county. On Sunday, November 29, 1914, appellant had been hunting, carrying a rifle and revolver. On returning home near evening, he found some of his hogs missing. He also discovered during the day that his boar had been castrated by some one. He started out hunting for his missing hogs. He came to Miller’s place about five o’clock in the evening, evidently in an angry mood. He carried his revolver with him. Whether it was purposely concealed on his person is not very clear from the evidence, but that it was not seen by the witnesses present at the time of the shooting until it was actually drawn by him immediately preceding the shooting, seems plain. Miller was in his barn feeding his horses. Two of his neighbors, Roberts and Hall, were there talking to him, evidently as mere visitors. Roberts’ testimony as to what occurred upon appellant’s arrival is as follows:

“A. He [Miller] was feeding his horses and me and Mr. Hall was standing talking to him, and John Hawkins dashed into the door and ran up where we were at and Mr. Miller says, ‘Hello John,’ and he says, ‘What the hell’s the matter with you fellows,’ and Mr. Miller says, ‘Nothing, John, what’s the matter with you?’ and he says, ‘What did you cut my hog for?’ and Mr. Miller says, ‘I never cut your hog, John,’ and he turned to me and says, ‘Did you?’ and I says, ‘No,’ and then he says, ‘There is a dam lie between you fellows somewhere,’ and I says, ‘Do you mean me, John?’ and he

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says, 'No,' and Mr. Miller says, 'You mean me, John?' and no he didn't say anything and Mr. Miller says so again and again and he didn't say anything and Mr. Miller tapped him with his fist and says, 'You mean me?' and he said— Q. What kind of a blow did he strike him? A. Like that (indicating), a kind of side strike, in the temple on this side (indicating). Then Hawkins drew a gun and Mr. Miller he went running back and hollowing for him not to shoot, and Mr. Miller ran back eight or nine feet and Hawkins followed him about eight feet before firing and Mr. Miller was just running in behind Mr. Hall and he fired just then, and he had backed up along beside of me and was drawing his gun toward me and I knocked the gun back and he shot at me as he turned round to his left and we scuffled there and while we was scuffling Mr. Miller stepped over against the hay and Hawkins kept on scuffling towards him and when he got up to two or three feet drew his gun up in Mr. Miller's breast and shot him. Then we got the gun away from him and held him until the sheriff come. Q. What was the effect of those two shots on Mr. Miller? A. How did it affect Mr. Miller? Q. Yes. A. Well, the first shot I couldn't tell that it affected him very much only he just leaned against the hay and hollowed the first shot, 'He shot me,' and the last shot killed him. Q. How long did he live after the last shot? A. I should judge half a minute, something like that."

Hall's testimony is substantially to the same effect, as follows:

"A. Well, I, Mr. Roberts and Mr. Miller were in the barn at Mr. Miller's place and Mr. Miller was feeding the horses. Mr. Hawkins came in the barn and replied, 'Who of you, —,' he said first, 'What the hell's the matter with you fellows?' Mr. Miller says, 'Nothing, what's the matter with you, John?' John says, 'Who of you fellows cut my hog?' Mr. Miller says, 'It wasn't me.' Then he turned around to Mr. Roberts and asked him, and he says, 'It wasn't me either, John.' Mr. Hawkins says, 'There is a damn lie out among you fellows.' And Mr. Roberts was standing a little closer than Mr. Miller and Mr. Roberts says, 'Do you mean me, John?' and he says, 'No. I didn't mean you.' And Mr. Miller made the same reply and he made no answer. He walked around to him and asked him again and he made no

reply and Mr. Miller struck him with his fist and staggered him over a little ways against a sack pile there. Mr. Hawkins raised with his gun in his hand. Mr. Miller asked him not to shoot and I asked him the same thing and Mr. Roberts also. He didn't hesitate but shot Mr. Miller. Mr. Miller walked around behind me. At the time he put the first shot into Mr. Miller he was standing pretty near behind me. Then he turned around the second shot and shot at Mr. Roberts, and Mr. Roberts grabbed hold of him and turned him kind of around and then the last shot, the next shot he fired at Mr. Miller again. As soon as he done it Mr. Miller replied, 'He has killed me.' By that time Mr. Roberts got hold of Hawkins and succeeded in taking the gun away from him. I held Mr. Hawkins then and Mr. Roberts went to phone for the sheriff. While he was gone to phone for the sheriff I asked him, 'Why did you do that?' and he says, 'I don't know what in the world I done it for. I didn't have a thing against you fellows. I just got mad and lost my head.' . . . Q. When he come in did you notice the position of his hands before the shot was fired? A. Yes, sir, he had them under his sweater coat. Q. Which hand? A. The right hand. Q. What position was his left hand? A. Swinging down by his side. Q. When Miller struck him what kind of a blow did he hit? A. Kind of a side blow. Q. Whereabouts did he strike him? A. On the left side of his face. Q. You say he staggered him? A. Yes, sir, some, over against a sack pile in the barn. Q. When did you first see the revolver in his hand? A. He was just about straightened up when I seen the revolver. He almost had it leveled when I noticed it. Q. When was the first time you saw his right hand when he come in the barn? A. Just as I looked around at him. I took a minute at that time to notice what he was going to do. Q. When was the first time after he came in the barn that you saw his right hand? A. Not until he pulled the gun. Q. At the time he pulled the gun where was Miller? A. Stepping back behind me, kind of. Asking him not to shoot him. . . . Q. How far was Hawkins from Miller when the first shot was fired? A. Well, about eight feet. Q. How far was he away at the time the second shot was fired? A. Well, I should judge about three or four feet."

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The jury was fully warranted by the evidence in believing, as it evidently did, that these versions of the affray given by Roberts and Hall in their testimony were substantially correct, and that it was light enough there to readily distinguish the action of each one present; though appellant in his testimony insists that it was dark at the time; that he did not know that Miller was in fact retreating, and believed that some one was actually assaulting him at the time he fired the shots.

It is contended by counsel for appellant that the trial court erred in refusing to withdraw from the consideration of the jury the charges of murder in both the first and second degrees and submit to the jury only two forms of verdict: one, "Not guilty," and another, "Guilty of manslaughter," so that the jury would have no alternative but to find in one or the other of these two forms. The substance of this contention is that there was not sufficient evidence of malice to warrant the jury finding the appellant guilty of murder in either the first or second degrees. It seems to us, however, that the facts above noticed, which the jury were clearly warranted in believing, fully answer this contention; especially in view of the general rule recognized by this and other courts as stated in *State v. Drummond*, 70 Wash. 260, 263, 126 Pac. 541, as follows:

"The killing being admitted or proved beyond a doubt to have been done by the appellant, the burden of justifying his act or reducing the crime to that of manslaughter was upon him. *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047, and cases there cited."

Indeed, even aside from this rule, the evidence seems ample to support the conclusion reached by the jury, so far as the question of malice is concerned, in view of the frame of mind in which appellant arrived upon the scene, his possession of the revolver which the jury might well have believed was concealed, and his manner of addressing those present imme-

diately preceding the shooting. It seems quite plain to us that the trial court was amply justified in submitting to the jury at least the question of appellant's guilt of murder in the second degree.

It is contended in appellant's behalf that the trial court, in any event, erred in refusing to withdraw from the jury the question of appellant's guilt of murder in the first degree, an instruction to that effect having been requested and refused. This contention we think finds its answer in the fact that appellant was not found guilty of murder in the first degree, but was acquitted thereof by the finding of his guilt of murder in the second degree. The argument seems to be that there was not sufficient evidence of premeditated malice or "premeditated design to effect the death" of Miller, using the language of Rem. & Bal. Code, § 2392 (P. C. 135 § 279), defining murder in the first degree, to warrant the submission of that question to the jury. Were we to so hold, as a matter of law, still appellant having been acquitted of that degree of murder, the denial of the request for withdrawal of that question from the jury proved not to be prejudicial to his rights. The following decisions support this view: *State v. Underwood*, 35 Wash. 558, 77 Pac. 863; *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *Downing v. State*, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758.

The trial court instructed the jury in part as follows:

"You are instructed that although you may believe from the evidence that deceased struck the defendant with his fist, and thereby made the first attack, still, if you further believe from the evidence that the deceased after such attack, and before the fatal shot was fired, ceased his attack upon defendant and in good faith withdrew from the conflict by retreating or otherwise, then the defendant would not be justified in taking the life of the deceased after the deceased, if you so find, had withdrawn from the conflict."

Counsel for appellant make but little contention against the correctness of this as a statement of the law; but urge

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that the instruction does not state all upon that subject which appellant was entitled to in view of the theory of his defense, which is that he was acting in self-defense; that it was not light enough in the barn for him to see or know that Miller was retreating; that he was being attacked by some of those present; that he did not know just which one it was because of the want of sufficient light and the confusion; and that he shot without intent to injure any one other than those he thought were actually attacking him at the time he shot. The complaint of appellant's counsel against the instruction seems to be that it fails to take account of his theory of the defense, in that it makes no mention of what appellant's rights might be in the light of his want of knowledge of Miller retreating. We note that counsel for appellant made no request for any instruction of this nature. We therefore think he is not in position to complain of the instruction above quoted, since it seems to clearly state the law generally applicable to such cases.

While appellant may not have been the aggressor in the sense of striking the first blow, he manifestly was the aggressor in the sense that his actions brought on the affray, if the versions given by Roberts and Hall are to be believed, as the jury had the right to believe them. In the text of 21 Cyc. 807, touching the question of what constitutes one an aggressor in such an affray, it is said:

"Any wrongful or unlawful act of the accused which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the difficulty, is an act of aggression or provocation which deprives him of the right of self-defense, although he does not strike the first blow. So one is the aggressor where he provokes another into a quarrel causing a fatal affray, or commences an assault upon the other. The act of provocation must have been committed at the time the homicide occurred, and must have related to the assault in the resistance of which the assailant was killed."

These observations seem to be well supported by the authorities. This view of the law, as applied to the facts of this case, would argue strongly against appellant's right of self-defense. In any event, he was not justified in following up the affray rather than retreating or at least desisting, in the light of the facts which the jury were warranted in believing, and evidently did believe. 21 Cyc. 820.

It seems quite plain to us that this record shows no prejudicial error against appellant, and that he has been awarded a fair trial.

The judgment is affirmed.

MORRIS, C. J., MAIN, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 12857. Department Two. February 2, 1916.]

CHARLES PETERSON, *Respondent*, v. J. W. BREWER *et al.*,
Appellants.¹

CORPORATIONS—STOCK—SALE—WARRANTY—EVIDENCE — SUFFICIENCY. A warranty that stock sold was of the value of \$235 a share is sufficiently sustained by evidence of the purchaser that defendant specifically "guaranteed" its value to him at that sum at their first interview, and at the second interview, when others were present, he consented to guarantee the stock "as he had promised;" although such other witnesses all testified only to a general warranty at the second interview; since their evidence did not contradict the plaintiff.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered October 14, 1914, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Hurn & Upton and *C. J. Lambert*, for appellants.

W. E. Southard, for respondent.

BAUSMAN, J. — Action in damages for deceit, tried without a jury, with a second cause of action on express warranty.

¹Reported in 154 Pac. 788.

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Plaintiff was a director and vice president of a bank when its defendant cashier sold him some more of its stock while concealing its insolvent condition. The evidence upon the first cause of action we find it needless to set out at length, since we are satisfied that, while a fraud was intended, the facts have not left it actionable.

We pass to the second cause of action. The cashier's alleged warranty was that the stock had a value of \$235 a share, and the judgment of the lower court was for the purchase price on that basis. Defendant and his wife appeal.

The situation presented is that of a country bank in which the plaintiff, a farmer, obviously unfamiliar with banking, was one of three directors. The entire business, it is plain, was left to the cashier, defendant Brewer; and while plaintiff as a director would be estopped to plead ignorance of some things of which he complains were this action between himself and others, such as depositors, we see no reason to apply that rule as between him and Brewer. The plaintiff relates that, at the first interview concerning the purchase of this stock, Brewer specifically "guaranteed" its value to him at \$235 a share. A second interview occurred some time later, when plaintiff brought a check with which to complete the purchase. He then said, there being some hesitation on Brewer's part as to accepting the check, that if Brewer would guarantee the stock "as he had promised," he, for his part, would have a man guarantee the check.

At this second interview others were present, all of whom agree that Brewer did warrant the stock in general terms, though none of them mention a particular amount, and plaintiff himself, testifying as to this talk, refers to Brewer's language as general. Cross-examined about this interview, he appears to state that what was then said about the warranty was all the warranty he ever had, but on redirect ex-

amination he reasserts that there was a warranty at the first interview, without again saying in what amount.

Now the lower court found explicitly in plaintiff's favor on a warranty in the express sum of \$235 a share, and this court, following its numerous decisions to that effect, will not disturb such a finding where the evidence does not contradict it. Here we find everybody testifying to Brewer's warranting the stock in general, and the plaintiff testifying to its being warranted in a particular sum. Nobody, as to this last, contradicts him at all, so the contradiction, if any, must be inferred from his own narrative as we have set it out. The lower court, with all the witnesses before it, evidently found no inconsistency in his account of the two interviews, and the words "as he had promised," used at the second interview, fairly imply that the witness did not mean to withdraw what he had said as to the first. The lower court also found the stock to have been worthless when sold to plaintiff.

Judgment affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

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Opinion Per MAIN, J.

[No. 12884. Department Two. February 2, 1916.]

SOUND CONSTRUCTION & ENGINEERING COMPANY, *Appellant*,
v. JOSHUA GREEN, *Respondent*.¹

CONTRACTS—BUILDING CONTRACTS—CLAIM FOR EXTRAS — CONSTRUCTION OF CONTRACT—DECISION OF ARCHITECT—CONCLUSIVENESS—REASONABLE DIFFERENCE OF OPINIONS. Where the contract for a building made the architect the arbiter or umpire for the purpose of deciding questions that might arise on the contract, his decision that a third elevator was called for by the contract and was not an extra, in case the owner exercised the option of adding four stories to the six stories started, is not fraudulent or arbitrary, but is binding on the parties, where building experts disagreed as to the proper construction of the contract in that respect, and taking the contract and plans and specifications as they were, the minds of men may honestly and reasonably differ as to whether the third elevator was required for the ten-story building or was to be considered as an extra.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 27, 1914, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Affirmed.

Weter & Roberts, for appellant.

Bronson, Robinson & Jones, for respondent.

MAIN, J.—This action arises out of a building contract, and has for its basis a claim for an item in the sum of \$4,078.40 as an extra. After the issues were framed, the cause was tried to the court sitting without a jury, and resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

On April 23, 1912, the respondent contracted with the appellant for the erection of a six-story building at the southwest corner of Fourth avenue and Pike street, in the city of Seattle, for the sum of \$188,000. This building was to be constructed according to plans and specifications then agreed upon. Thereafter, and before the construction of

¹Reported in 154 Pac. 791.

the building was entered upon, it was decided to alter the original plans from what was known as slow-burning construction to reinforced concrete construction, with foundation and walls sufficiently heavy to carry four additional stories, provided the owner should elect to have the building erected ten stories instead of six. For the purpose of evidencing this modification of the original contract, a supplemental contract was entered into on June 25, 1912. This supplemental contract provided that the contractor would build the four additional stories in accordance with the specifications for the sum of \$86,496, provided the owner should declare his intention of having these stories added before the seventh floor slab should be completed. Plans or contract drawings were signed by the parties. Under the contract for the six-story structure, two elevators were to be installed, and the building was so constructed that a third elevator could be added. If the building was erected only six stories, the space for the third elevator was to be used for other purposes.

The owner, within the time specified in the supplemental contract, notified the contractor that he desired the building erected to ten stories instead of six. The architect, acting for the owner, then directed the contractor to construct the building for the third elevator. The ten-story building was erected and three elevators provided for. In the construction of the three elevators, the contractor was not required to remove any previous construction. His claim as an extra for this work is based upon constructive work only.

The controversy in this case is over the claim by the contractor that the third elevator was an extra. The question is whether the plans and specifications required the installation of the third elevator if the owner exercised, as he did, his option to have the building erected the four additional stories. The contract between the parties, except in particulars not here material, made the architect the arbiter or umpire for the purpose of deciding questions that might

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arise under the contract; and provided that the decision of the architect upon all such matters, as between the owner and the architect, should be final and binding. The architect construed the plans and specifications to call for the third elevator for the ten-story building. According to this construction, the contractor would not be entitled to recover for the third elevator as an extra. According to the contention of the contractor, the construction of the third elevator was not called for by the plans and specifications if the building should be erected to the height of ten stories.

It is not claimed in this case that the parties did not have the right by contract to constitute the architect an umpire for the purpose of settling disputes and making his decision final, in the absence of fraud, arbitrary conduct, or palpable mistake; but it is claimed that the architect, in construing the plans and specifications as calling for a third elevator when the four additional stories were added, acted arbitrarily, and did not exercise an honest and independent judgment.

Upon the trial of the cause, the contractor produced a number of expert witnesses who testified that the plans and specifications could not reasonably be read to call for the construction of a third elevator when the four additional stories were added. The owner, the respondent, produced a number of expert witnesses who testified that the proper reading of the plans and specifications required the contractor to make the construction of the third elevator for the ten-story building. The trial court found that the contract, plans, and specifications reasonably meant that, if the additional stories were added, the third elevator was to be installed; and that the decision of the architect was not fraudulent, arbitrary, or the result of palpable mistake on his part.

The question here is not whether the architect can read into the plans and specifications what is not found there, and thus, in effect, make a new contract for the parties, but is whether the architect acted arbitrarily, and did not exercise

an honest and independent judgment in construing the plans and specifications as calling for the third elevator. A careful study of the plans and specifications lead us to the conclusion that the architect's construction of them was not arbitrary, and that he is not guilty of having failed to exercise an honest and independent judgment. It is doubtless true that, taking the plans and specifications as they are, the minds of men may honestly and reasonably differ as to their construction; but this would not be sufficient to overturn the judgment of the architect, who had, by the contract, been made the arbiter to settle questions that might arise, and whose decision should be final and conclusive upon the parties. Had the plans and specifications been such that they would bear reasonably only one construction, and that was the opposite from that given by the architect, a different question would be presented.

The judgment will be affirmed.

MORRIS, C. J., BAUSMAN, HOLCOMB, and PARKER, JJ., concur.

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Opinion Per MAIN, J.

[No. 12981. Department Two. February 2, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. E. H. LYNN,
Appellant.¹

FALSE PRETENSES — ELEMENTS OF OFFENSE — MISREPRESENTING EXISTING FACT. To constitute grand larceny committed by color or aid of any fraudulent or false representation, under Rem. & Bal. Code, § 2601, the representation must be of an existing or past fact.

SAME—FALSE REPRESENTATIONS—EXISTING FACTS—EVIDENCE—SUFFICIENCY. A charge of grand larceny by inducing the prosecuting witnesses to invest in a corporation to be organized to do a grocery business, by falsely representing that defendant "had \$4,000 in cash at the time" received from the sale of two stores in the city of S. which he would invest in the business, is not sustained where the proof merely went to show that defendant did not put more than \$225 worth of groceries into the business.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 17, 1915, upon a trial and conviction of grand larceny. Reversed.

Shepard, Burkheimer & Burkheimer, for appellant.

O. T. Webb, Percy Gardiner, and *E. C. Dailey*, for respondent.

MAIN, J.—The defendant in this case is charged with the crime of grand larceny. Whether by the information it is intended, under Rem. & Bal. Code, § 2601 (P. C. 135 § 695), to charge larceny by "color or aid of any fraudulent or false representation," or larceny by embezzlement, or both, does not clearly appear. From a reading of the state's testimony and the remarks of the trial judge, it would appear that, up to the time when the state rested its case, there was an attempt to prove larceny by embezzlement. When the evidence in chief for the state was in, the defendant moved for a directed verdict, claiming that the evidence was insufficient to

¹Reported in 154 Pac. 798.

establish any crime, and that the venue was improperly laid in Snohomish county. In denying this motion, the trial court required the state to elect whether it would have the cause go to the jury under the claim that the crime was committed by false and fraudulent representations or by embezzlement. The state concluded to interpret the information as charging the crime of larceny by false and fraudulent representations. Thereupon the evidence upon behalf of the defendant was introduced and the cause was submitted to the jury. A verdict of guilty was returned. Motion for a new trial being made and overruled, the defendant appeals from the sentence and judgment.

The facts, briefly stated, are: On June 18, 1914, and for some time prior thereto, the prosecuting witness, one J. B. Waggett, was operating an automobile truck between Seattle, in King county, and Cathcart, in Snohomish county, Washington, with his residence in Seattle. On that day the appellant called upon Waggett for the purpose of engaging him to haul certain store fixtures from Seattle to Cathcart. Prior to this date, the parties had no acquaintance. In the course of the conversation relative to the hauling of the store fixtures, Lynn told Waggett that he was going to organize a corporation to conduct a grocery business at Cathcart in a certain store building there situated, which he had previously leased, and that the store fixtures which he was desiring to move were to be used in such business. Waggett then told the appellant that he, Waggett, also contemplated starting a store at the same place. The question of Waggett taking stock and becoming interested in the corporation to be organized by the appellant was discussed at that time by the parties. Waggett claims, and he so testified, that the appellant told him that he had sold two stores in Seattle for \$4,000, and that if Waggett would invest \$800 or \$1,000, the appellant would invest \$4,000 in cash in the

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business enterprise. Waggett gave a somewhat different version, which it is unnecessary here to detail.

On June 20, Waggett hauled the fixtures from Seattle to Cathcart. About a week later, Waggett went to Cathcart and began constructing partitions in the rear end of the store building which was to be occupied by the business, preparatory to moving his family therein, which he did on July 8, following.

Articles of incorporation for the Cathcart Grocery & Mercantile Company were duly prepared and filed, a certificate of incorporation being issued on July 14, 1914. Thereafter, and on July 17, the appellant and wife turned over to the corporation in payment for stock subscribed for by them, real and personal property listed at the value of \$4,352.31. On July 20, 1914, Waggett, in Seattle, King county, paid to the corporation \$300 in cash, and turned over a note of the face value of \$500. Thereupon sixteen shares of the capital stock of the corporation of the par value of \$50 per share were issued and delivered to him.

After the store was opened, both Waggett and the appellant worked therein. The business was conducted some months, when it became insolvent and a receiver was appointed. After the appointment of the receiver, Waggett filed a verified claim with the receiver in which he stated that the \$300 was a loan to the corporation. Upon the trial, Waggett testified that there was not placed in the store more than \$225 worth of merchandise.

The controlling question in this case is whether the evidence shows that the appellant was guilty of grand larceny committed by color or aid of any fraudulent or false representation. It is claimed that the false representation consisted in the appellant's statement that he had \$4,000 in cash as the result of the sale of two stores, when in fact he did not have that amount, or any sum in excess of \$100.

A false and fraudulent representation, under the statute, in order to constitute a crime, must be of an existing or past

fact. 2 Bishop, New Criminal Law, § 415; 1 McClain, Criminal Law, § 678. The falsity of a fact, past or present, being one of the elements of the crime, it was incumbent on the state to prove that the appellant did not in fact have \$4,000 in cash at the time it is claimed he so represented. *State v. Hurley*, 58 Kan. 668, 50 Pac. 887.

The articles of incorporation of the Cathcart Grocery & Mercantile Company state its objects, among other things, to be to conduct a general mercantile business for the purpose of purchasing and selling of all kinds of groceries and merchandise, and to acquire, by purchase or otherwise, real and personal property of every kind and description. A number of other purposes are also set out, such as usually appear in articles of incorporation.

The evidence relied upon to show the falsity of the statement as to the \$4,000 is that of the complaining witness that not more than \$225 worth of groceries were put into the business. This, obviously, does not disprove the statement attributed to the appellant that he had sold two stores in Seattle and had received therefrom \$4,000 in cash which he expected to put into the business. For aught that appears in the evidence, he may have had the \$4,000 as it is claimed he said he had. The evidence is doubtless sufficient to cast suspicion upon the truthfulness of his alleged claim that he had \$4,000 in cash. But if he is guilty of a crime, all the elements of the crime must be established by competent evidence, and the conviction cannot be sustained unless the evidence was such that the jury had a right to find that all the elements of the crime were proven beyond a reasonable doubt.

It may well be doubted whether the venue was properly laid in Snohomish county, construing the information as charging the crime as being committed by color or aid of false and fraudulent representations. But it is not necessary to decide this question, since the other question discussed is decisive of the action.

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Syllabus.

The judgment will be reversed, and the cause remanded with directions to dismiss.

MORRIS, C. J., BAUSMAN, HOLCOMB, and PARKER, JJ.,
concur.

[No. 13142. Department Two. February 2, 1916.]

R. G. HARGRAVE *et al.*, *Appellants*, v. THE CITY OF COLFAX,
Respondent.¹

ACCORD AND SATISFACTION—PLEADING—ANSWER—SUFFICIENCY. In an action for damages to abutting property by the regrade of a street, the city's answer to the effect that the parties agreed that the city should build a concrete retaining wall, the building of which "would make everything perfectly satisfactory" to the plaintiffs, sufficiently alleges an "accord and satisfaction," in the absence of any motion to make more definite and certain, especially where plaintiffs joined issue thereon and set up their version of the contract or agreement.

HUSBAND AND WIFE—CONTRACT BY HUSBAND—DAMAGE TO COMMUNITY PROPERTY—ACCORD AND SATISFACTION—KNOWLEDGE OF WIFE—ESTOPPEL. An accord and satisfaction of damages from the regrade of a street, by the city's construction of a retaining wall, entered into by the husband alone, is sufficiently shown to have been authorized by the wife so as to bind her and the community, where it appears that they resided on the property, that the wife first discovered the work of the city, which was stopped until the agreement was made, that it was made at their residence, and the wife knowingly permitted the husband to act in the matter; in view of Rem. & Bal. Code, § 5918, giving the husband the management and control of the community real property.

ACCORD AND SATISFACTION—PLEADING AND ISSUES—INSTRUCTIONS. Upon an issue as to whether the plaintiff husband entered into an accord and satisfaction of damages to abutting community property from the regrade of a street, by an agreement for a concrete retaining wall to be built by the city, an instruction limiting the jury to such issue, and to the amount of the damages, if any, is not error where instructions requested by plaintiffs were to the same effect, except as to a further direction as to the effect of the wife's failure to join in the agreement, where there was no evidence on the part of the plaintiff to meet defendant's evidence to the effect that the husband acted at all times on behalf of himself and wife.

¹Reported in 154 Pac. 824.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered June 18, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action for damages from the regrade of a street. Affirmed.

Neill & Burgunder, for appellants.

Chas. F. Voorhees, for respondent.

HOLCOMB, J.—Appellants' action against respondent was to recover damages by way of diminished market value, resulting from the regrade of streets on which their community property abuts. The streets being improved were Main and James streets, abutting on appellants' property on two sides. The original grade on both streets was established by ordinance in 1891, and the streets were afterwards physically graded to the established grade. Appellants' property was thereafter improved and adjusted with reference to the grade, and, among other improvements, a stone wall was built around the property on Main and James streets. Appellant R. G. Hargrave signed the petition to the city council to regrade and improve Main and James streets adjacent to the property of appellants. In April, 1912, respondent commenced to improve the streets by regrading and paving. The regrade cut each street at the corner of appellants' property about six feet below the old established grade. When the graders began to grade James street, they commenced to cut at the base of appellants' retaining wall without leaving a shoulder. Appellants called the attention of the street committee of the city council to the fact that, if the grade was made in that way, the retaining wall on James street would fall and appellants' property slide onto the street. The street committee of the council went to the property and, in company with R. G. Hargrave, viewed the premises and decided to build a concrete wall along James street about four feet out from the property line, and fill in behind it so as to hold the old retaining wall in place and prevent it from

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falling. This wall was afterwards built by the city at its expense.

In its answer, respondent alleges that, by reason of R. G. Hargrave having signed the petition asking for the street improvements referred to, and the fact that, during all the time the improvement was being made, appellants resided on the property and made no demand for damages prior to the bringing of the suit, they are estopped to claim any damages whatsoever by reason of the matters of which they complain in their complaint. It was also affirmatively alleged by respondent, in substance, that the building of the concrete wall hereinbefore referred to by the respondent, at its expense, would make everything perfectly satisfactory to appellants; and it was further alleged that, in all the matters and at all the times referred to by respondent, R. G. Hargrave acted for himself and for and on behalf of his wife and coplaintiff, Frances P. Hargrave.

Appellants unsuccessfully moved to strike from the affirmative answer the allegations that R. G. Hargrave acted for himself and for and on behalf of his wife and coplaintiff; that he signed a petition for the improvement of the street; that he at all times knew, during the making of the improvement, of the plans therefor and never at any time made any objections; and that he expressed himself satisfied with a proposed ten per cent grade of the streets adjacent to their property. Upon the denial of these motions, appellants replied, denying certain allegations, and admitting the allegation of respondent's answer that there was an understanding and agreement between the parties that respondent would build, at its own expense, the concrete wall referred to and in the manner mentioned; but denied that it was then understood and agreed that everything would be perfectly satisfactory to them. They further affirmatively alleged that there was no agreement and understanding between appellants, or either of them, and respondent that the erection of the wall would compensate them or be in satisfaction for any

of the damages claimed in the complaint. At the trial, when the defense rested, upon motion of appellants to strike from the record and to instruct the jury to disregard any and all testimony offered by respondent in relation to any affirmative matters alleged in its answer except in regard to values and damages, the court allowed all of appellants' motion, except as to evidence pertaining to the understanding or agreement in connection with the building of the wall. Upon this issue, the case was submitted to the jury, and the jury returned a general verdict in favor of respondent, and answered in favor of respondent the following special interrogatory: "Did plaintiffs and defendant have an understanding or agreement at or about the time defendant agreed to build the concrete wall mentioned in the pleadings, whereby or in pursuance of which all damages to plaintiffs' property caused by the regrading of Main and James streets should be fully settled?" To this interrogatory, the jury answered "Yes."

I. All the errors claimed by appellants arose out of, or in connection with, the affirmative answer. As to most of the affirmative answer, there is nothing of which appellants can now complain. All of the matters were stricken, and the jury instructed to disregard the evidence offered in support of them, except as to the understanding or agreement between the parties concerning the building of the concrete wall. It is claimed by appellants that what was left of the affirmative answer was intended by respondent to set up an equitable estoppel, and considered by the court to raise the question of accord and satisfaction. As to the accord and satisfaction, it is asserted that it does not sufficiently plead same; that a plea of accord and satisfaction "must allege that what was done or given was in satisfaction of the cause of action, and also that what was done or given was accepted in satisfaction." 1 Cyc. 343, 344.

It is asserted that, in respondent's pleading, it is nowhere alleged that the building of the wall was to be in satisfaction of all damages. It is true that the affirmative answer did not

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use the specific words "accord and satisfaction," and did not specifically say that the things agreed upon were to be in full satisfaction of all damages. It seems to have used language conforming to the form of the understanding or agreement which, as shown by the record of the testimony on behalf of respondent, was that the building of the concrete wall and other minor matters by the respondent "would make everything perfectly satisfactory to appellants." There is no particular magic in words. Our code abolishes all distinctions formerly existing at common law as to the form of actions or pleadings. It is now provided simply that a complaint must consist of "a plain and concise statement of facts constituting the cause of action, without unnecessary repetition," and "a demand for the relief which plaintiff claims" (Rem. & Bal. Code, § 258; P. C. 81 § 223); that an answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant," and "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition" (Rem. & Bal. Code, § 264; P. C. 81 § 235). Accordingly, under the code, the pleading is judged by the facts pleaded, and not by any technical rule obtaining under the common law. The allegations of the answer might possibly have been more specific or more technical, but appellants did not move to make them more definite and certain and did not demur to the answer. No motion of any kind was made against that particular affirmative allegation of the answer upon which the case was submitted to the jury, except the motion, at the conclusion of respondent's evidence, that all testimony offered by defendant in relation to any affirmative matters alleged by it be disregarded by the jury. Upon this affirmative allegation, appellants had joined issue and set up their version of the contract or agreement. They allege that the wall was built according to the agreement merely to prevent future damage by the sliding of their property.

It is immaterial what technical name be given to the matter set up in its defense. It stated the facts as the code requires, in ordinary and concise language. It certainly was competent to allege and to prove that the parties had agreed in advance upon the method of settling the matter of damage arising from the regrade of the streets; and upon an allegation and showing that the agreement had been performed by the respondent, it would certainly be a good and sufficient defense to the action for damages, either as a legal or an equitable defense. An "accord is a satisfaction agreed upon between the party injuring and the party injured." § Blackstone, 15. We think accord and satisfaction were here sufficiently alleged. It is a question for the jury whether the agreement or the performance was accepted in satisfaction. *Bahrenburg v. Conrad Schopp Fruit Co.*, 128 Mo. App. 526, 107 S. W. 440.

II. Appellants contend that the wife never agreed to the building of the wall as a settlement of all the questions that might arise between them; that she never was a party to any contract or agreement at all, and that, therefore, she was not bound by any action taken by her husband involving the taking or damaging of their community property. There is ample evidence to the effect that R. G. Hargrave made the agreement alleged by respondent and as found by the jury. Whether Mrs. Hargrave authorized the same is another question.

The appellants joined in their pleadings and joined in the reply to the respondent's affirmative answer. In the reply they admitted that there was a contract between them and respondent, but denied that it was as alleged by respondent. The statute, Rem. & Bal. Code, § 5918 (P. C. 95 § 29), provides that "the husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which it is sold, conveyed, or encumbered." The

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case of *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594, is cited and relied upon by appellants to sustain their contention. In that case it was held that, in an action for damages for the wrongful taking of community real property, the wife was a necessary party plaintiff with the husband; and it was stated that the husband alone could not authorize such taking or damaging of the community real estate in the first instance. The case is of little importance here, however, for the reason that, in this case, the husband and wife are joined in the action and they admit and allege that a contract was made. Furthermore, there is evidence in the record tending to show, that the wife first discovered the nature of the grade or cut that was being made adjacent to their property; that she telephoned her husband, and that her husband came to see the work and called the street committee of the city council to act in the matter. The wife did not testify. Whatever agreement was made, was made at their residence. They resided upon the premises all the time. The appellants certainly cannot be heard to say that the community could authorize the husband to act as the agent to make one contract in regard to the matter then in controversy, for the benefit of appellants and which was acted upon by respondent, but not another. The wife knowingly permitted the husband to deal with the matter. Under the circumstances, we think there was sufficient evidence to warrant the jury in finding that the agreement was made for and with both appellants. *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Pearl Oyster Co. v. Seattle & Montana R. Co.*, 53 Wash. 101, 101 Pac. 508.

III. The court instructed the jury, limiting their consideration of the matters involved in the case to the questions: (1) Was there a contract, understanding, or agreement between the plaintiffs and the defendant, made or had at or about the time agreed, to build the concrete wall mentioned in the evidence, whereby or in pursuance of which all damages occasioned to plaintiffs were settled by reason of the city

erecting the wall; and (2) if there was no such understanding or agreement, then what damages, if any, did plaintiffs suffer by reason of the change of grade? These instructions were followed by others appropriate to those issues, and the jury were instructed that the burden of proof was upon respondent to support its affirmative allegation. These instructions were excepted to by appellants, and an instruction tendered and refused by the court is also made the basis of a claim of error. Under the issues in the case developed, however, we think the instructions given were proper, and the refusal of the instruction tendered by appellants was not prejudicial. The requested instruction was, in effect, the same as the instructions given by the court upon the issues submitted to the jury, except that it contained the further direction that, if the jury found by the preponderance of the evidence that R. G. Hargrave did make such agreement, it would not be binding on the plaintiffs, unless they further found by a preponderance of the evidence that the plaintiff Frances P. Hargrave also made such agreement, or authorized her husband to make such agreement.

Bearing in mind that a part of the affirmative allegation upon this issue of respondent's answer was that R. G. Hargrave was at all times and in all the things referred to acting for and on behalf of himself and his wife, and that there was some evidence tending to support that allegation, and that there was no testimony to the contrary on the part of appellants, and observing further that the court instructed the jury that the burden of proof was upon the defendant to prove by a preponderance of evidence the material allegations of the affirmative matter set up in its answer which had not been admitted by appellants in their reply or during the progress of the trial, we are of the opinion that the court committed no error in giving and refusing instructions.

We find no error. Judgment affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

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[No. 12977. Department One. February 4, 1916.]

PHILIP BERTRAND, *Appellant*, v. WILLIAM HUNT, *as Administrator etc. et al., Respondents*.¹

PRINCIPAL AND AGENT—RELATION—NEGLIGENCE—ACTS OF AGENTS—AGENCY OR BAILMENT. Where plaintiff allowed a prospective buyer and sales agent, who was indirectly interested in plaintiff's sale, to take plaintiff's automobile for a few days for the purpose of demonstration and teaching the buyer to drive the car, and the car was damaged and the buyer killed while attempting to drive the car under the sales agent's instructions, the sales agent was plaintiff's agent and his negligence, if any, was plaintiff's negligence; and the estate of the deceased buyer is not liable for the loss of the car or the negligence of the buyer as a gratuitous bailee.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered July 20, 1915, upon findings in favor of the defendant, in an action for damages, tried to the court. Affirmed.

Bridges & Bruener, for appellant.

Hogan & Graham, for respondent Hunt.

G. R. Snider, for respondent Poulson.

CHADWICK, J.—Plaintiff was the owner of a Chalmers automobile. He learned that Mrs. Minnie Leitch might buy a machine. He sought her out and offered his machine for \$1,200. Defendant Poulson operated a garage at Aberdeen, and was the selling agent for the Chalmers company. It coming to the knowledge of Poulson that plaintiff had spoken to Mrs. Leitch, and believing that he might be able to sell plaintiff a new car of the same make, he took it upon himself to discuss the matter with her, he being a boarder at her house.

On the 22d day of May, 1914, Poulson was at the home of Mrs. Leitch for lunch, and he asked her to go with him and examine and ride in the car of the plaintiff. They

¹Reported in 154 Pac. 804.

must have discussed, in some way, the price and size of the car. Testimony shows that Poulson had obtained the offer of better terms than had been made by plaintiff, that is to say, that if Mrs. Leitch bought the car, plaintiff would take \$600 down and \$600 in sixty or ninety days without interest. At any rate, Mrs. Leitch went with Poulson and they drove to the place where plaintiff had his car. Poulson obtained a tape line and measured the car to see if it would go into a chicken house which Mrs. Leitch intended to use as a garage if she bought the car.

Plaintiff testifies that he was about to make some repairs on the car in the way of putting in a new pump, and that Mrs. Leitch suggested that they be allowed to take the car and return it in a day or two when he might make the repairs. The other witnesses do not agree whether Mrs. Leitch or Poulson made such proposal. The weight of testimony would sustain the finding that if any such suggestion was made, it was made by Poulson. Poulson and Mrs. Leitch took the car. After driving for a few blocks, Mrs. Leitch got into the driver's seat so that Poulson could teach her the working of the machine. He had had her, with some friends, out with him the night before for the purpose of instructing her, and a few days before had directed her in driving a car from the golf grounds into the city.

While driving down a hill on Fourth street, Mrs. Leitch at the wheel, the car came to a bridge situated at an angle of about forty-five degrees with the road. Mr. Poulson testifies that he directed Mrs. Leitch to turn to the left, and that, instead of turning to the left, she gave a quick turn to the right. The car went over a sidewalk, into the railing, and down into the gulch below. Mrs. Leitch was killed, and this action was brought on the theory that Poulson and Mrs. Leitch were gratuitous bailees and liable to answer for the damages to the machine.

The court below found that Poulson was not the agent of the plaintiff, and found him liable for the damages sustained.

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He further found that Mrs. Leitch was in no way responsible for the accident, and entered judgment accordingly. Poulson has not appealed.

Appellant accepts the findings of fact and instances that, inasmuch as Poulson was not the agent of respondent, it follows that he was a gratuitous bailee, and that Mrs. Leitch, having an interest in the purchase of the car, was equally liable with him. This might be so under some circumstances, but we cannot agree with the finding, which was excepted to, that Poulson was not the agent of the appellant.

Mrs. Leitch was no more than a prospective buyer. Plaintiff was desirous of selling his machine. Poulson believed if the machine were sold he would be able to replace it with a new machine. Appellant knew of his interest in the transaction and allowed him to take the car for the purpose of demonstration in furtherance of the mutual designs.

The car would not have been taken under the circumstances if it had not been for the suggestion of Poulson, and we may assume that appellant would not have permitted his car to be taken by any prospective buyer unless he was satisfied that he was a competent and efficient driver, or in the company and under the direction of a skillful chauffeur.

The law will not put an inexperienced person, who is learning to drive an automobile in the presence of and under the tuition of an experienced man, to the hazard of answering in damages unless there is proof of positive negligence. We find no such proof in the record.

It may be suggested that there is no proof that Poulson was ever made the agent of appellant, but agency may be implied from all the attending circumstances. To state the rule in a negative way, a person may so use his property with relation to others that he will be estopped to deny an agency.

We find that the duty of care to safely guide the machine was upon Poulson; that he was the agent of appellant; and

that the negligence, if any, was the negligence of the agent, and in law, that of the plaintiff, and that he cannot maintain an action against the estate of Mrs. Leitch.

Affirmed.

MORRIS, C. J., FULLERTON, MOUNT, and ELLIS, JJ., concur.

[No. 13083. Department Two. February 4, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v.
ALEC TOWESSNUTE, *Respondent*.¹

INDIANS—RIGHTS AND TITLE TO SOIL—EFFECT OF TREATY. The prior occupancy of American soil by the Indian tribes did not vest them with sovereignty or any title to the land that was ever recognized by the white race, the Indian being merely an occupant with possessory uses for subsistence, and a favored ward of the Federal government.

SAME. The fact of Indian sovereignty and title to the land is not admitted by a document called a "treaty" with the tribe as a "nation" in prior possession, in terms which "concede," "convey," and "relinquish," rights to the Federal government.

SAME—INDIAN TREATY—CONSTRUCTION. An Indian treaty, interpreted as a provision from a guardian of the tribe, should be construed toward benevolence to the Indians, but with due regard to the rights of the whites.

SAME—INDIAN TREATY—RIGHT TO FISH OUTSIDE RESERVATION—EASEMENT—STATE REGULATIONS. The Indian treaty of 1859 (12 Stat. at L. 951) securing to the Yakimas the exclusive right of taking fish in all the streams running through or bordering upon the reservation, and "also the right of taking fish at all usual and accustomed places in common with citizens of the territory," merely grants an easement for ancient fishing places outside the reservation, in common with the whites, upon equal terms, subject to state regulation and laws requiring a fishing license.

CONSTITUTIONAL LAW—POLICE POWER—CONSERVATION OF FISH. The police power is not confined to subjects of safety, but extends to those of convenience and prosperity, including the conservation of fish.

INDIANS—INDIAN TREATIES—CONSTITUTIONAL LAW—POLICE POWERS. An Indian treaty will be held impliedly repealed by the act admitting

¹Reported in 154 Pac. 805.

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a state to the Union, rather than that the state be crippled in its police power.

INDIANS—INDIAN TREATIES—STATES—ADMISSION. An Indian treaty respecting fishing rights in a territory cannot impair the power of Congress to admit the territory to statehood upon terms of sovereignty equal to that of the other states.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for Benton county, Linn, J., entered June 10, 1915, upon sustaining a demurrer to the informations, dismissing consolidated actions for the violations of laws relating to the taking of fish. Reversed.

The Attorney General, C. W. Fristoe, and L. L. Thompson, for appellant.

Francis A. Garrecht, for respondent.

BAUSMAN, J.—It is conceded, by stipulation and in argument, that the Indian, Towessnute, tribal inhabitant of the Yakima Indian reservation, has committed violations of our fishing statutes on the Yakima river, not only several miles outside of the reservation, but at a spot in no way appurtenant to it by path or easement. It is also conceded that, if his tribe may continue to do these things, the salmon industry of this state must be grievously wounded in its very nurseries, because the Yakimas and other tribes, whose contentions in cases now pending are the same, claim many such spots on various waters to be exempt from these statutes, and because these people, once savage and wandering, have become settled in their modes of life and frequently pursue fishing for a profit. The habits of salmon in seeking at certain seasons the highest fountains of our streams to spawn in are well known, and such is their persistence and thronging at the entrance to them and at either rapids or dams that the state has found it imperative to save them at such places by regulations.

These considerations, together with what we conceive to be a misunderstanding of certain Federal decisions, make it best to discuss this case somewhat at length. Inconvenience or loss to ourselves, however great, is no ground, indeed, for taking away any rights that the Indians may actually possess; but is proper to be considered, in deciding from a dubious document, whether Congress, looking to the future of this commonwealth, ever intended to bestow them.

What Towessnute did contrary to the statute was to fish without a license, snag salmon with a gaff hook, and catch fish without hook or line within a mile of the dam. These acts constitute, for the purpose of this discussion, one offense, since all were committed at one place where Indian privileges are asserted to justify them. Towessnute's defense is that his manner of fishing was ancient in his tribe and the spot an immemorial resort where he required no license. The lower court justified him under the Yakima treaty of March, 1859 (12 Stat. at Large, 951), which was passed after Washington had been made a territory with legislative power over "all rightful subjects of legislation," and which, after creating a reservation whither the Yakimas should retire, provided:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The reasoning was that the words "in common with" would be unduly stretched if the Indians were to be subjected, even at a fishing resort beyond the reservation, to state regulation. All that he lost by that phrase, it was contended, was that the white man might fish there too. Within the res-

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ervation, only the Indian might fish; outside, both; the former in his old way, the white man as the state should prescribe. To express the argument concisely, the Indian, as a sovereign, merely yielded a partnership. The old locations were his before the treaties; by that convention he admitted the white man, but the white man got only what the Indian clearly conceded. In terms, indeed, the treaty, mentioning nothing of the manner of fishing, secured to the Indian only the place. But it was not necessary to secure the manner also in express terms. Not surrendered, it was retained. In support of this argument, counsel point to the priority of the Indian's possession; to the fact that the document is called a treaty; that this treaty deals with the Yakimas as a "nation;" and that the words on the Indian side are "concede," "convey," and "relinquish." In short, the Yakimas kept the reservation and ceded the outside places on their own terms.

The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. From France, from Spain, from Mexico, and from England we have ever proclaimed our title by purchase, by conquest, and by cession, in all of which great transactions the migratory occupant was ignored. Only that title was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands, occupied, to be sure, but not owned by any one before. *Johnson v. McIntosh*, 8 Wheat. 543. If in *Worcester v. Georgia*, 6 Pet. 515, the supreme court speaks of the Indians having something which the whites had yet to purchase, it was not title, but mere possessory uses for subsistence. Later cases continue to plant our title on discovery. *Martin v. Waddell*,

16 Pet. 367, 409; *United States v. Rogers*, 4 How. 567, 572.

The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. True, arrangements took the form of treaty and of terms like "cede," "relinquish," "reserve." But never were these agreements between equals. Even when we dealt with a "nation" the Indians were not "within the description . . . of an independent state or sovereign nation, but of an Indian tribe . . . wards of the nation . . . communities dependent on the United States . . . the recognized relation . . . that between a superior and an inferior." *Choctaw Nation v. United States*, 119 U. S. 1, 27.

These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

The treaty, then, interpreted as provision from the great guardian of this tribe, should be construed toward benevolence, and even be bent somewhat toward the Indian's notion of his rights. On the other hand, the children of the donor are not to be ignored. The whites, too, were to enjoy, and enjoy by right, the waters and the soil. The document must be read from that point of view as well.

But suppose in it a purpose solely of protecting the Indian, we must here first inquire what was particularly aimed at in allowing him these outside resorts of fishery, when the reservation itself is watered by the Yakima and other streams. It could not have been to insure the Indian's existence. It certainly was not done out of a fear that he would not find

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within the reservation sufficient food. For if that was in the mind of the donor or of the Indian, why was the white man allowed to share these resorts? Nothing could be plainer than that the numbers of the white fishers, their advancing population, and their encroaching towns and mills would speedily render the reserved fishing spot worthless. Accordingly, those who deem these locations of vital importance to the Indian must surely wonder why Congress failed to state in positive words that these resorts too were to remain exclusively the Indian's. Why were they not declared inviolate on both banks of all the streams and forever?

Not only was this not said, but there is inserted the words "in common with citizens of the territory." Such as argue that the Indians relied on either the literal words or the general spirit of this treaty must acknowledge that this expression is perfectly plain; that the Indian expressly admitted the white man to these locations, and that he did not deem it indispensable to keep the white man off them altogether. It must be assumed that the Indians understood this simple phrase. In our opinion, they did understand it and did not object to it; but, since it is asserted to be historically true that there was great discontent among the Yakimas concerning this treaty, and that some of their chiefs refused to sign it, it is possible that they understood this privilege as we understand it, and that this feature was one of the things not acceptable to them.

As for Congress and the intent of that body, it was not unaware that Indians when off the reservation have ever been subject to the criminal laws of the states and territories; that the police power is indispensable to any commonwealth, and that the right of regulating fish and game is a proper exertion of such a right. *Geer v. Connecticut*, 161 U. S. 519; *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469; *Sligh v. Kirkwood*, 237 U. S. 52.

Was it, then, intended that the Yakimas, at ancient places of fishing outside of their reservation, were forever to fish as

they pleased and when they pleased, ignoring the regulations of the future commonwealth for the preservation of what would keep such a place useful to both parties in interest? Surely it is not fretful to suppose that the treaty gave to the Indians the exclusive part of their privileges in the reservation and that nothing better than equality with the white man was given outside of it. Let us consider the situation at that time. The Indian already saw the approaching end of his roving, already felt it best to get an area that should be his alone. His hunting ground already narrowed by the settlements, he was really giving up little. By the treaty he was gaining an exclusive domain of eight hundred thousand acres, immunity from intrusion by the white man, freedom from local laws, either civil or criminal, and perpetual existence in a valley both fair and ample. In return we must suppose that he was to give up everything outside of it. Whatever he could retain outside by this negotiation was, so to speak, so much added to the bargain.

The main purpose of the government was to separate the Indian from the white man and to care for the Indian in a district more confined. Yet it was natural to indulge him with the right of hunting on the outside public lands whilst these remained unsold and to let him fish at his old resorts outside. But at these last he should have no advantage over the white man. The title to the spot should not be the Indian's—only an easement. The two races should fish in common. The territory, in general, was to be the white man's, and he could even acquire absolute title, but he was to let the Indian fish; and that he might not, by crafty statute, subsequently cut off the Indian's privilege at these places, a positive easement was impressed upon the land. Then were inserted the words "in common with citizens." These words were not used to give something to the white man, but to give something to the red man; not to give the Indian an advantage, but to save him from disadvantage. Such, in our opinion, is their true intent. They are an eternal guar-

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anty that at these spots the Indian shall have equal, but not more than equal, rights. The fishing grounds remain for both races without advantage to either. The white man's laws may operate on the enjoyment of the right, but must operate on both races alike, and the Indian, since the lands were to be sold to settlers, should be sure of access to the water by an easement.

To adopt the other construction is not only to ignore a simple phrase and give the Indian an advantage, but is to suppose that Congress designedly crippled the government of a future state in powers salutary and essential. The police power is not confined to subjects of safety, but extends to those of convenience and prosperity. *Chicago, B. & Q. R. Co. v. Drainage Com'rs*, 200 U. S. 561, 592. It undoubtedly extends to the conservation of fish. *Smith v. Maryland*, 18 How. 71. Nor is it given up, nor can it be given up, by any legislature to the national government. It must be exerted, to be sure, in such manner as will not infringe other rights which the states, by the constitution, gave up to the central authority; but in controversies on this point the Federal decisions clearly resolve every doubt in favor of the local law. Indeed, even on a subject within the exclusive rights of the general government, the state laws of police will be upheld until the Federal law has actually been extended to that subject. *Sligh v. Kirkwood*, *supra*.

It can hardly be imagined, then, that the easement was to be forever exempt from that local sovereignty which, in the promotion of mere prosperity, has compelled a railway company to rebuild, at its own great expense, a lawfully constructed bridge in order that tracts below might be rendered not healthful but more salable and tillable; which has compelled farmers to suffer without compensation floods that were caused by the government's damming the stream; which has cut off old and valuable landing places, by an artificial shifting of a river, without compensation to the riparian owner; which has rendered a dock useless and lost to the

owner while the public tediously builds a tunnel. (See the cases collected in *Chicago, B. & Q. R. Co. v. Drainage Com'rs*, *supra*.)

But, it will be said, the local government may so legislate that, at the place of easement, there can be no fishing in future at all. Replying to this, it is plain that the white man must in that event equally lose. In the second place, the police power, when, exerted not for public health or safety but for prosperity, it encounters vested rights, may become unlawful by excessive degree, so it will be time enough to discuss such a situation when it arises. On the one hand, an owner cannot remove his property from the police power by making a contract concerning it. On the other hand, the state, under the police power, cannot commit a confiscation. Thus it is properly instanced that, while a city may lawfully restrict the height of buildings, it must not restrict to such a degree as renders the land entirely useless. *Hudson County Water Co. v. McCarter*, 209 U. S. 849, 355.

It is a peculiarity of almost every legal principle that, enforced to an extreme, it changes its character; and as both time and the circumstances must be considered in deciding whether an exertion of police power is really gnawing a constitutional right, it is not improbable that what might have been reckoned a needless or excessive exertion of it over these Indian rights in the early days of 1859, might be adjudged a proper one in 1915 by reason of the vast changes in the white population and the altered manners of the Indians. As much undoubtedly was conceded by the Federal supreme court in respect to the exclusive power of Congress to prohibit the alcohol traffic with the Indians in a case in which it was argued that a state's criminal jurisdiction would be unfairly cramped by such Federal law, the court, while upholding that statute, remarking as to a future situation in which the Indians might greatly diminish and become scattered through the state:

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"A prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state." *Perrin v. United States*, 232 U. S. 478, 486.

If it be argued that the rights of this commonwealth while a territory were less than those of a state and that the police power was then at the mercy of Congress, we must remember that the supreme Federal tribunal has held Congress itself incompetent to cut off this power from a future state. Long after one of these Indian treaties, Congress, by an act admitting a state to the Union on equal terms with its sisters, was adjudged to have revoked, and to have had the right to revoke, whatever in the treaty itself may have impaired the police power. *Ward v. Race Horse*, 163 U. S. 504. There it was held that the act admitting Wyoming was superior to a treaty with the Bannock Indians, in so far as the latter were by that treaty eternally privileged to hunt as they pleased on unoccupied Federal land, since so extensive, numerous, and scattered were the unsold lands that Wyoming would practically be deprived of her police power in respect to game and would enter the Union no equal sister.

In *Coyle v. Smith*, 221 U. S. 559, Oklahoma was relieved of a feature of its admission act that attempted to fix the location of its capital city. Congress, it was held, had no power to admit states under conditions unequal in these respects.

The first decision establishes a repeal of an Indian treaty even by implication rather than that a state be crippled in its police power. The other decision maintains the insufficiency of any act of Congress, even when designed to such an end, to impair the equal sovereignty of the state that it was then creating.

Nor is *United States v. Winans*, 198 U. S. 371, in conflict with these views, though under this same Yakima treaty it

sustains the tribe in an ancient fishing place on another river, the Columbia. Nothing can be clearer than that what was there involved was a white settler's attempt to ignore the Indian's easement. The adjoining land had passed from the general government to a white owner, who, the court properly held, was making it impossible for the Indian to enjoy his privilege. What the case decided was that the government grantee had bought the land with that easement on it, and even from this commonwealth the grantee could not get something additional that would impair that easement. As for the police power, it was neither involved nor discussed in that case, so it is little in point to remark that the act admitting this state to the Union was also held not to have affected the easement derived by the treaty. The court was careful to be understood as sustaining a mere easement. That it might not put the privilege above the police power, it says of the easement at page 384:

"Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

Winters v. United States, 207 U. S. 564, is as easily distinguished, for what that decided was that the enabling act of Montana did not give water appropriators rights superior to appropriations made by government officials on an Indian reservation for the benefit of that reservation, when the appropriations were made before statehood. The equal footing right of Montana when entering the Union was clearly not impaired.

Neither do we find contrary authority in such cases as *United States v. Sandoval*, 231 U. S. 28; *Ex parte Webb*, 225 U. S. 663; *Dick v. United States*, 208 U. S. 340. What these and several other similar cases hold is that the acts admitting territories into statehood do not prevent the general government's continuing to protect Indians by its own laws, and beyond the bounds of the reservation, from persons who seek to sell them alcohol. The new state's equal

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footing is not diminished by such enactments or by the continuation of such authority, for the tribal Indian is a ward of the general government under the clause of the Federal constitution to which the states expressly consent, and such ward he remains wherever he may be.

The judgment is reversed, with instructions that the case be reinstated and that the demurrer to the information be overruled.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

HOLCOMB, J. (dissenting).—Whatever may be the views of the majority as to what an Indian treaty with our national government is—whether it is a treaty between two sovereigns or not—it is certainly a solemn compact binding in law and in honor upon both parties to it.

The majority in this case treat this compact as one that the national government through Congress rightfully could, either expressly or by implication, set aside at will without the consent of the other party, the Indian tribe, and that it did so by implication by force of the enabling act authorizing the formation of the territory of Washington into a state.

I cannot concur therewith. Good faith requires the observance of the spirit as well as the letter of the compact with the Indians, more especially because the Indian tribe is the weaker of the two parties to the compact. In doubtful questions the doubt has most generally been resolved in favor of the Indian tribes.

The stress laid upon that phrase in the clause of the treaty under consideration, "the right of taking fish at all usual and accustomed places, *in common with citizens of the territory*," is a strained construction. Had the phrase been "upon the same terms" in place of "in common with" the citizens of the territory, the construction would have been just. At the time of the treaty it was not known, possibly not even surmised, that the future state would rigidly regulate and partially prohibit the fishing in its streams; that

certain fishing apparatus would be prohibited; the number or quantity of fish taken limited; the fishing season limited, and license required to fish at all.

It is undoubted that the state can assume and assert its police power over game and fish for their protection and conservation. But that sovereign power is subject to a still more supreme power—that of the Federal government when exercising its lawful jurisdiction. In some fields of government, the state is supreme; in others, the nation. I am as jealous of the proper restriction of each as any one. In the exercise of its lawful power over a matter of which it had supreme and exclusive jurisdiction, the nation made a compact with the Yakima tribe of Indians, whereby the Yakima tribe “relinquished and ceded” to the United States its rights or claims, whichever term may be preferred, to certain territory, in return for which the United States granted to the Yakima tribe a certain area of land together with certain immutable rights outside thereof.

The view of the majority is exactly that of the district judge in *United States v. Winans*, who, concerning this same treaty and the same clause, said:

“The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States.”

That view was disapproved by the Federal supreme court in language rather testy and ironical. The case was appealed and the lower court was reversed by the supreme court, the decision being reported in 198 U. S. 371. The opinion stated the issue as above summarized, and further made these observations:

“In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. *Indeed, acquired no rights but such as they*

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would have without the treaty. [Italics mine.] This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' 119 U. S. 1; 175 U. S. 1. . . . There was a right outside of those boundaries [of the reservation] reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. . . . *And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.* [Italics mine.]"

To my mind, by this construction, the rights of the appellant in question are as plainly and emphatically determined as if the decision were in the present case. It is conclusive of this controversy and binding in law upon this court. We have no option whatever but to construe this treaty right, as has the supreme court of the United States concerning the same treaty.

Furthermore, if the state can regulate the fishing of the Indians under the guise of police power, it can prohibit, and that in the face of the treaty, for regulation is a part of the power to prohibit and the one but a step toward the other. If the state should prohibit citizens of the state from fishing in any manner upon these streams in question, it would either be compelled to except Yakima Indians not citizens because of the treaty, or include them in the general effect of the law, and thus abrogate the treaty as to those rights—a thing the state cannot do.

I therefore dissent.

[No. 13084. Department Two. February 4, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN ALEXIS,
Appellant.¹

INDIANS—TREATIES—CURTAILMENT OF POLICE POWERS OF STATE. Congress, in making provisions by an Indian treaty for fishing rights of the Indians of a territory, could not do so at the expense of the police power of the future state, notwithstanding that the Indians were more or less dependent upon the fish for subsistence (HOLCOMB, J., dissenting).

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered August 17, 1915, upon a trial and conviction of violating the laws relating to the taking of fish. Affirmed.

Craven & Green, for appellant.

The Attorney General and W. P. Brown and L. L. Thompson, for respondent.

PER CURIAM.—This case is identical in all respects with *State v. Towessnute*, just decided, except that it involves the rights of another tribe of Indians, the Lummi, and a different treaty, the Muckl-teeoh, proclaimed in 1859. The language involved in that treaty is the same as in *State v. Towessnute*, *ante* p. 478, 154 Pac. 805, and the same justification is attempted. The lower court in this case held with the state and, under our opinion in the other, did so correctly. This cause having been argued as one controversy with the *Towessnute* case, it will not be necessary to enlarge upon our opinion already rendered.

Judgment affirmed.

HOLCOMB, J. (dissenting).—For the reasons stated in my dissent to the decision in *State v. Towessnute*, *ante* p. 478, 154 Pac. 805, I dissent.

¹Reported in 154 Pac. 810; 155 Pac. 1041.

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Opinion Per Curiam.

ON PETITION FOR REHEARING.

[Decided March 17, 1916.]

PER CURIAM.—In a petition for rehearing, counsel for the appellant Indian complain that we have not discussed certain testimony which showed contemporaneous interpretation of this treaty and assurances by the territorial governor, Stevens. From this and other testimony, it is contended that the Lummis, as distinguished from the Yakimas in *State v. Towessnute*, ante p. 478, 154 Pac. 805, depended upon the fish outside of the reservation, more or less, for subsistence. It would appear, also, that they gained a livelihood by trafficking in the catch. These things, which we are told should relieve the Lummis from the *Towessnute* decision, do, on the contrary, emphasize against the Lummis the reasoning of that case. Under the Federal decisions, as we understand them, Congress, in making provision for Indians, could not do it at the expense of the police power of the future state. This Lummi case strikingly shows to what ravages the salmon industry of Washington is exposed by these Indian treaties, as they are sought to be interpreted. Nor does it make any difference that the fish caught by the Lummis were seeking foreign waters to spawn in, for it is the policy of this state to protect these fish at certain times in their migration to the fountains of British Columbia, where they are not left without protection, but are permitted to recreate themselves and replenish our waters.

[No. 12302. *En Banc*. February 5, 1916.]

MARTINA JOHNSTON, *Respondent*, v. SEATTLE TAXICAB & TRANSFER COMPANY *et al.*, *Appellants*.¹

APPEAL—DISMISSAL—JURISDICTION — JUDGMENT. Upon dismissal of an appeal upon jurisdictional grounds, the supreme court cannot order an affirmance of the judgment.

Appeal from a judgment of the superior court for King county, Humphries, J., entered April 13, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through an obstruction in a street. Modified.

Brightman, Halverstadt & Tennant, for appellant Seattle Taxicab & Transfer Company.

John W. Roberts and *George L. Spirk*, for appellant Puget Sound Bridge & Dredging Company *et al.*

McCafferty, Robinson & Godfrey, for respondent.

ON REHEARING.

PER CURIAM.—Upon the original hearing of this appeal, the judgment was reversed as to some of the parties, and the appeal of the Seattle Taxicab & Transfer Company was dismissed. As against it, the judgment was affirmed. *Johnston v. Seattle Taxicab & Transfer Co.*, 85 Wash. 551, 148 Pac. 900. The dismissal was upon jurisdictional grounds. The Taxicab Company thereupon filed a petition for rehearing, contending that, having dismissed its appeal for want of jurisdiction, the judgment could not be affirmed, as such affirmance was an exercise of jurisdiction. It is clear that this contention is sound. While we have rendered judgment for costs against appellant upon the dismissal of appeals, we have uniformly held that lack of jurisdiction to hear the appeal is lack of jurisdiction for all purposes, and refused to

¹Reported in 154 Pac. 787.

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affirm the judgment below upon the appeal being dismissed upon jurisdictional grounds. *Grunewald v. West Coast Grocery Co.*, 11 Wash. 478, 39 Pac. 964; *Henry v. Great Northern R. Co.*, 16 Wash. 417, 47 Pac. 895; *Jones & Co. v. Cunningham*, 79 Wash. 4, 139 Pac. 612; *Davis v. Virgis*, 39 Wash. 256, 81 Pac. 688; *Davis v. Huth*, 43 Wash. 383, 86 Pac. 654.

It follows that the affirmance of the judgment was an inadvertence and it must be modified. All that part of the former opinion directing an affirmance of the judgment is recalled and stricken. As so modified the judgment will be entered as first directed.

[No. 12335. *En Banc*. February 5, 1916.]

YOUNG MEN'S CHRISTIAN ASSOCIATION, OF SEATTLE,
Appellant, v. ALBERT E. PARISH, *as County*
*Assessor of King County, Respondent.*¹

STATUTES—GENERAL OR SPECIAL LAWS—TAXATION—EXEMPTIONS. 3 Rem. & Bal. Code, § 9098, exempting from taxation all property of Young Men's Christian Associations which shall be wholly used, or to the extent solely used, for religious purposes, is special legislation and in contravention of Const., art. 7, § 2, requiring the legislature to prescribe by general law such regulations as shall secure a just valuation for taxation of all property; because it excludes from its operation the property of other organizations which may be devoted to religious purposes.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 11, 1914, in favor of the defendant, dismissing an action for injunctive relief, tried to the court. Affirmed.

George H. Walker and Fletcher Lewis, for appellant.

John F. Murphy, Samuel Morrison, Alfred H. Lundin,
and W. F. Meier, for respondent.

¹Reported in 154 Pac. 785.

MAIN, J.—This is an action brought for the purpose of restraining the county assessor of King county from listing for taxation certain real property. The trial resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

The appellant, at the time the action was instituted, was the owner of lots 2 and 3 and the east half of lots 6 and 7, in block 21, of Boren's addition to the city of Seattle. This property fronted on the west side of Fourth avenue, in the city of Seattle, and extended from Madison street to Marion street. The appellant had for some years owned lots 2 and 3, and had erected thereon a six-story brick and concrete building, which is known as the Y. M. C. A. building. After this building had been erected, the association acquired two adjacent half lots on the south, facing Fourth avenue, and extending from the main building to Marion street. This latter property was, when acquired, and still is, improved by the east half of the former Stander hotel, a six-story brick and stone structure. Since its purchase by the association, it has been connected with the main building as an annex thereof, and is permanently partitioned off from the unacquired part of the Stander hotel. The entire property thus owned by the association is used for the various activities and departments of the Young Men's Christian Association.

The objects of the association, as set forth in its articles of incorporation, are: "The improvement of the spiritual, mental, social, and physical condition of the young men of Seattle by the support and maintenance of lectures, gospel services, libraries, reading rooms, gymnasium, recreation grounds, etc."

The county assessor of King county was asserting the right to list this property for purposes of taxation upon the tax rolls for the year 1913, when the present action was brought for the purpose of restraining such listing.

The controlling question in the case is whether the statute under which it is claimed the property is exempt from taxa-

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tion is constitutional or unconstitutional. The statute, Rem. & Bal. Code, § 9098, as amended by chapter 117 of the Laws of 1913, p. 351, relating to taxation, after exempting certain other specified property, provides:

"Also all property of Young Men's Christian Associations . . . which shall be wholly used, or to the extent solely used, for the religious purposes of such association." § Rem. & Bal. Code, § 9098.

It will be noted that this is an exemption to the association by name, with a limitation that only such of its property as is "wholly used," or to the extent "solely used" for the religious purposes of such association, shall be exempt.

Section 2 of article 7, of the state constitution, after requiring that the legislature shall provide by law a uniform and equal rate of assessment and taxation upon all property in the state and prescribe such regulations by general law as shall secure a just valuation for the taxation of all the property, provides:

"That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation."

Under this section of the constitution, all property within the state is subject to taxation, unless it falls within one of the classes mentioned in the constitution and is exempted therefrom by a *general law*. The question then arises, Is the statute by which the property of Young Men's Christian Associations is claimed to be exempt a general or a special law? If it is a special law, obviously the attempted exemption is invalid under the constitutional provision quoted. If it is a general law, then it conforms to the constitutional requirement.

The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A special law is one which relates to particular persons or things, while a general law is one which

applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions. 4 Words & Phrases (2d series), p. 635; *Budd v. Hancock*, 66 N. J. L. 133, 48 Atl. 1023; *State ex rel. Attorney General v. Miller*, 100 Mo. 439, 13 S. W. 677; Sutherland, Statutory Construction, § 121.

In 4 Words & Phrases (2d series), p. 635, the rule is stated: A special law is one that relates to particular, as distinguished from a general law, which applies to all persons or things of a class.

The rule is stated in *Budd v. Hancock, supra*, as follows:

"A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained the law is general. Within this distinction between a special and a general law the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

Many other authorities could be cited supporting the rule; but as the controversy upon this phase of the case is over the application of the law, rather than its statement, further citation in support of the rule seems unnecessary.

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In applying the rule, this court in *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926, held that an act of the legislature which attempted to confer upon certain municipal corporations which had previously undertaken to incorporate under an invalid law the right to incorporate under the statute without reference to the population, but solely by reason of their peculiar condition, was a special and not a general law. It was there said:

"As to such communities, is this a general or a special law? It is claimed by the learned counsel for the appellants that it is general, because it applies to all communities in the state similarly situated. But we think that cannot be said to be the exclusive test. If the operation and effect of a statute is necessarily limited to a particular class or number of persons or things, it is as much a special statute, whatever may be its form, as it would be if it applied to but one person or thing only."

In *Terry v. King County*, 43 Wash. 61, 86 Pac. 210, the court had under consideration a statute which specifically conferred upon King, Pierce, and Spokane counties, and the cities of Seattle, Tacoma, and Spokane, power to contract indebtedness for the purpose of purchasing armory sites and assisting in the construction of armories. No other counties or towns in the state were mentioned in the act. Nor was it possible for any other county, even though its population should equal that of the counties named, to come within its provisions. It was there held that the law was special and not general, citing the previous case of *Denver v. Spokane Falls*, *supra*.

Applying the rule of law stated and its application as appears in the two cases last cited, to the facts in the present case, Was the statute exempting the Young Men's Christian Association general or special? The exemption covers the property of such associations wholly used, or to the extent solely used, for religious purposes of the association. If the property should not be devoted to a religious purpose, then it does not come within the exemption. The effect of the

statute is to exempt only the property of Young Men's Christian Associations which is devoted to religious purposes. Under this statute, other property in the state devoted to religious purposes would not be exempt. The property of the class referred to in the statute is that devoted to religious purposes. The association is one organization which devotes property to such purposes. The property of other associations devoted to a religious purpose could not claim the exemption. The statute is special and not general, because it excludes from its operation the property of other organizations which is or may be devoted or set apart for religious purposes.

It would hardly be claimed that a statute exempting the church property of a particular religious denomination by name, and which thus would exclude from its provisions the church property of all other denominations, would be a general law. Likewise a statute which exempts property of Young Men's Christian Associations only to the extent such property is devoted to religious purposes, as already stated, must necessarily exclude the property of other organizations and associations devoting property to the same purposes. The operation and effect of the statute is limited to one of the organizations which compose a class, and is therefore special. The case falls within the holdings of this court in the cases of *Denver v. Spokane Falls* and *Terry v. King County, supra*.

A number of cases are cited in the briefs where the property of Young Men's Christian Associations has been held exempt. In every one of the cases cited, with one exception, the exemptions were under statutes which did not exempt the property of the associations by name, but exempted all property by general language which was devoted to religious, benevolent, or charitable purposes. Had the statute in this state under which this case arose contained some such general language an entirely different question would be presented.

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The one case referred to as supporting an exemption where the statute applied to a Young Men's Christian Association by name was that of *Young Men's Christian Ass'n v. City of Keene*, 70 N. H. 223, 46 Atl. 186. In the state of New Hampshire, however, where that case was decided, there was no constitutional provision against the passage of a special law.

In reaching the conclusion that the statutory provision is unconstitutional, we have not overlooked the rule adopted by the previous decisions of this court that a law will be presumed constitutional and valid until the contrary clearly appears, and that it is the duty of the court to sustain the law unless its invalidity is so apparent as to leave no reasonable doubt upon the question. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918. Notwithstanding this rule, we see no escape from the conclusion that the statute containing the exemption is special, and therefore, under the constitution, is invalid.

The judgment will be affirmed.

MORRIS, C. J., MOUNT, ELLIS, PARKER, HOLCOMB, CHADWICK, and FULLERTON, JJ., concur.

[No. 12830. Department Two. February 5, 1916.]

H. P. WHITE, *Appellant*, v. ED. POWERS *et al.*, *Respondents*.¹

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LIENS—ON CHATTELS—FORECLOSURE. Rem. & Bal. Code, §§ 1105-1107, providing that chattel liens, under § 1157, shall be foreclosed as in the case of chattel mortgages by placing in the hands of the sheriff a notice, to be personally served as in the case of a summons (which may be by publication in case the defendant cannot be found within the state, of which the sheriff's return that he cannot be found in the county shall be *prima facie* evidence), which notice shall be authority for taking immediate possession of the property, provides for due process of law, in that it provides for notice and opportunity to be heard through the property owner's right to remove a cause to the superior court and contest the foreclosure; although it allows foreclosure of a lien against a resident of the state without personal notice.

LIENS — CHATTLE LIENS—FORECLOSURE—NOTICE—NECESSITY—DUE PROCESS OF LAW. Under Rem. & Bal. Code, §§ 1105-1107, requiring notice of a chattel foreclosure to be personally served as in the case of a summons, and if the mortgagor cannot be found in the county, then by publication as in the case of a sale on execution, a foreclosure is void, as being without due process of law, where the sheriff's return showed no certificate either of service of the notice on the mortgagor or that he could not be found in the county.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 1, 1915, upon sustaining a demurrer to the complaint, dismissing an action of replevin. Reversed.

Hibschman & Dill (C. H. White, of counsel), for appellant.

HOLCOMB, J.—On October 14, 1913, one W. G. Nelms was the owner of a certain Avery Truck automobile, with the serial number 953, motor number 8,681, and on that day one E. A. Johnson performed labor and skill and furnished material in repairing it, amounting to \$13.50.

On December 22, 1913, Johnson, through his agent, filed a written notice of lien upon the automobile truck, describing it, in the office of the county auditor of Lincoln county, Wash-

¹Reported in 154 Pac. 820.

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ington, the filing and form of notice of lien complying with the provisions of Rem. & Bal. Code, § 1155 (P. C. 309 § 165).

On December 29, 1913, Johnson, through his attorney, delivered to the sheriff of Lincoln county a copy of the chattel lien notice, and demanded that the sheriff take possession of the automobile and sell it for the satisfaction of the lien claim. The sheriff accordingly, on that date, took into his possession the automobile, and prepared and posted in three public places in the county a notice reciting the claim of lien, the name of the owner of the automobile, and the default in payment, and giving notice of sale of the automobile more than ten days thereafter on January 9, 1914, at a specified place, at 10 o'clock a. m. The notice was signed by the attorney for the lien claimant as well as by the sheriff. On January 9, 1914, sale was made pursuant to the notice, for the sum of \$38.85, to the lien claimant, to satisfy his claim and costs, in all aggregating the amount for which the property was bid in, and of all of which the sheriff made return to the county auditor on the same day.

On July 9, 1914, appellant filed his complaint against respondents, alleging the foregoing facts, and further alleging that, at all the times mentioned, Nelms was a resident of Spokane county, Washington, and was not, at any of the times mentioned, present in Lincoln county; that no notice of any kind was given to Nelms, except the posted notice of sale; that defendants obtained possession of the automobile by reason of some transaction with Johnson, and that in so doing they and Johnson ignored the rights of Nelms and of appellant, and respondents claim to have the title to the automobile by reason thereof and of the lien and foreclosure proceedings of Johnson, and not otherwise; that all of the proceedings to establish and foreclose the chattel lien were had under and by virtue of statutes relating thereto (specifically mentioned), but that the statutes relied upon are unconstitutional and void under the constitution of Washington and the fourteenth amendment to the constitution of the United States,

and attempted to deprive Nelms of his property without due process of law; that Nelms duly conveyed all his right, title, and interest in the property to appellant by bill of sale, and his claims and demands for damages by an instrument in writing on May 7, 1914; that appellant is now the owner thereof; that the automobile was, at the time of sale referred to and now is, of the value of \$1,500, and that Nelms, prior to May 7, 1914, had been injured and damaged by the detention thereof by respondents in the sum of \$1,000. For the recovery of the automobile or the value thereof, and \$1,000 damages for its detention, judgment was demanded. Defendants demurred upon all the statutory grounds. The demurrer was sustained and the action dismissed upon appellant refusing to further plead.

The statute providing for a chattel lien in such cases as this provides (Rem. & Bal. Code, § 1157 [P. C. 309 § 169]) that the lien may be foreclosed by the same two optional methods of procedure provided for the foreclosure of chattel mortgages. Rem. & Bal. Code, §§ 1105, 1106, 1107 (P. C. 349 §§ 13, 15, 17), provide that chattel mortgages may be foreclosed by placing in the hands of the sheriff of the county a notice containing a full description of the mortgaged property with a statement of the amount due, signed by the mortgagee or his attorney; that the notice shall be *personally served* in the same manner as is provided by law for the service of a summons; that if the mortgagor *cannot be found in the county* where the mortgage is foreclosed, notice must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution; that is, by posting written or printed copies of the notice of sale in three public places in the county for a period of not less than ten days prior to the date of sale; that such notice shall be sufficient authority for the officer to take the mortgaged property into his immediate possession. These provisions of the statute were complied with, except that the sheriff made no certificate either of service of the notice of

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sale upon Nelms, or that he could not then be found in the county. The sheriff's proceeding was, therefore, *prima facie* defective. Appellant alleges that Nelms was not, at any of the times recited in the proceedings, present in Lincoln county, thus affirmatively showing that the prerequisite of "not found in the county" then existed, and a constructive basis of notice by publication in the manner provided by the foreclosure statute might have been certified by the sheriff.

The statute relating to foreclosure of chattel mortgages, upon which this proceeding was based, provides that the notice shall be personally served in the same manner as provided by law for the service of a summons. The law providing the manner of serving a summons (Rem. & Bal. Code, § 226, subd. 12 [P. C. 81 § 143-5]) provides that the summons shall be served by delivering a copy thereof to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Section 228, Rem. & Bal. Code (P. C. 81 § 149), provides that, when the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought that the defendant cannot be found in the county is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent, or attorney, stating that he believes that the defendant is not a resident of the state or cannot be found therein, and that he has deposited a copy of the summons and complaint in the post office directed to the defendant at his place of residence, unless he has stated in his affidavit that such residence is not known to the affiant, and stating, among other things, that the defendant is not a resident of the state but has property therein and the court has jurisdiction of the subject of the action, the service may be made by publication of the summons. It is provided, however, in § 1106, relating to service of notice of a sale under a chattel mortgage, that if the mortgagor cannot be found in the county where the mortgage is being foreclosed, it shall not be necessary to adver-

tise the notice or affidavit in a newspaper, "but the general publication directed in the next section shall be sufficient service upon all the parties interested." The "next section" is Rem. & Bal. Code, § 1107 (P. C. § 349 § 17), which provides that, after notice has been served upon the mortgagor, it must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution.

I. Reading and construing these provisions of the various statutes together, it is plain that the legislative enactments intended to provide for due notice and, therefore, due process of law. Appellant contends that a statutory enactment which allows foreclosure of a lien against a resident of the state without personal notice violates the constitutional provisions, art. 1, § 3, constitution of Washington, and amendment fourteen, U. S. Const. There are some authorities which support this view and hold that, where the owner of personal property resides within the state, foreclosure of a chattel mortgage or other lien upon the same can only be lawfully made by giving the owner reasonable notice aside from the mere seizure of the property, and constructive service is insufficient to confer jurisdiction. But that has never been universally followed. Due process of law means according to established forms of law, and the requirement is satisfied by the grant of a right to proceed in equity. *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440. In this state it has never been questioned that the proceeding to foreclose a chattel mortgage by notice of sale and by such constructive service of notice as the statute provides, if substantially followed, is valid. It was stated in *State v. Allen*, 2 McCord (S. C.) 55:

"I think therefore that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury, and is embraced in the alternative 'the law of the land.'"

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To the same effect are *In re Hackett*, 53 Vt. 354, and *Weimer v. Bunbury*, 30 Mich. 200.

It will be observed that both the statutes relating to foreclosure of liens upon chattels and relating to foreclosure of chattel mortgages provide that the debtor, or any person interested, may remove a cause to the superior court and contest the right to foreclose as well as the amount claimed to be due. This proceeding recognizes the universal principle adopted in the law of the land that "due process of law means an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard; and where such opportunity is granted by the law a citizen cannot complain of the procedure to which he is required to conform." *State ex rel. Barber Asphalt Paving Co. v. District Court of St. Louis County*, 90 Minn. 457, 97 N. W. 132. There is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformably to the fundamental rules of right and affecting all persons alike, is due process. *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995. The essential elements of due process of law are notice and opportunity to defend, but due process does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it. *Smith v. State Board of Medical Examiners*, 140 Iowa 66, 117 N. W. 1116; *Public Clearing House v. Coyne*, 194 U. S. 497.

In this state it was held that a statute giving servants, clerks, laborers, etc., the right to claim from the proceeds of execution or attachment sale of the property of their employers any amount not exceeding \$100 due them for services rendered within sixty days next preceding the levy of the writ, and providing for the litigation of such claims if disputed, is not open to the objection that it deprives one of his

property without due process of law. *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894. It has also been held that, in proceedings *in rem*, constructive service by publication is sufficient to give validity to a judgment purely *in rem*, and constitutes due process of law. *Wilson v. Beyers*, 5 Wash. 303, 39 Pac. 90, 34 Am. St. 858. The case of *Anderson v. Great Northern R. Co.*, 25 Idaho 433, 138 Pac. 127, cited by appellant, is in consonance with our views. In that case it was said:

“No process is ‘due process’ which does not give notice, either actual or constructive, and no ‘taking of property’ for debt is lawful unless the debt has been created with the knowledge and consent of the debtor. This knowledge and consent may be constructive so far as it is necessary to create a charge against property, but the statute which furnishes the constructive notice must provide process by which the claims may be measured and established so that the property owner may have a ready and certain method of knowing or ascertaining his liability. No such method is furnished by the statute under discussion.”

We think the case states the law correctly, but it does not apply to our statutes for foreclosing chattel mortgages or chattel liens. Our statutes provide for due process, in that they provide for notice and for an opportunity to be heard in court to measure the claims and rights of the parties.

II. In *Robertson v. Mine & Smelter Supply Co.*, 15 N. M. 606, 110 Pac. 1037, the opinion reads as follows:

“It appears that a suit was brought to foreclose a material man’s lien upon a mining claim and decree of foreclosure was awarded. The appellants, owners of the property, were not served with process of any kind. Upon notice of a proposed sale under the decree of foreclosure appearing in the local newspaper, the appellants brought an action to enjoin the sale. The court below refused the injunction and dismissed the complaint, from which judgment the appellants appeal.

“The foreclosure proceedings plainly violated the ‘due process of law’ clause of the 14th amendment of the Constitution

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of the United States. 'The essential elements of due process of law, as applied to matters of this kind, are notice and opportunity to be heard. *Simons v. Craft*, 182 U. S. 427, 436. The judgment of foreclosure was, therefore, absolutely void as against appellants, the owners of the property."

That case is applicable to the case before us, for the reason that, in the case before us, the owner of the property and lien debtor was not served with process of any kind, but attempt was made to proceed upon purely constructive notice without any certificate and showing of necessity therefor, the lien debtor being at the time a resident of the state and not even a *prima facie* showing being made to the contrary. The proceedings in this case, therefore, plainly violated the due process of law clauses of the state and Federal constitutions, although in our opinion the statutes sufficiently comply with those constitutional requirements. The statutes themselves were not complied with. The sale was therefore void.

The judgment is reversed, and the cause remanded with instructions to reinstate the cause and overrule the demurrer.

MORRIS, C. J., PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 12666. Department Two. February 7, 1916.]

F. E. HAMMOND, *Respondent*, v. WILLIAM K. JACKSON *et al.*,
Appellants, FRANK E. GREEN *et al.*, *Garnishee*
Defendants.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS OF WIFE—PERSONAL INJURIES TO WIFE—ACTIONS. A married woman, living with her husband, cannot alone make a binding contract with an attorney to prosecute an action for damages for personal injuries suffered by herself, in view of Rem. & Bal. Code, § 181, providing that a husband must be joined when the wife is a party to an action not relating to her separate estate and not between the spouses, unless she is living separate and apart from her husband, and Id., § 5917, vesting in the husband the management and control of the community personalty.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 29, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Green & Chester, for appellants.

Tucker & Hyland, for respondent.

FULLERTON, J.—The appellant Lulu B. Jackson, a married woman living with her husband, was injured while alighting from a street railway car operated by the receivers of the Seattle, Renton & Southern Railway Company. She conceived that her injury was caused by the negligent operation of the car and that she was entitled to recover in damages for such injuries. To that end she employed the respondent, Hammond, an attorney at law, to prosecute her claim therefor, promising to pay him for his services a certain percentage of the amount recovered. The contract was in writing, and was executed by the appellant as her separate contract, her husband not joining therein. The respondent immediately entered upon the performance of the

¹Reported in 154 Pac. 1106.

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contract, first petitioning the court for leave to sue the receivers, and failing in that, sought a settlement with the receivers, and succeeded in obtaining an offer from them to pay the sum of six hundred dollars in satisfaction of the claim.

While the foregoing negotiations were in progress, the appellant William K. Jackson, the husband of the other appellant, employed the law firm of Green & Chester to represent himself and the community of himself and wife in the prosecution of the claim against the receivers. This employment was also evidenced by a writing which was practically in the same terms as the contract made by the wife with the respondent. After this contract was entered into, the wife notified the respondent thereof by letter, dictated by the firm of Green & Chester, in which she told him to take no further action with reference to the claim; saying further, "As my husband was not a party to the agreement you had me sign, I do not feel bound by the agreement, and request that you return the same to me."

The firm of attorneys employed by the husband succeeded in settling the claim with the receivers for the sum of \$1,000. The respondent thereupon brought the present action against the appellants, basing his cause of action upon the contract signed by the wife. Issue was taken on the complaint and a trial was had before the court sitting without a jury. The court found the contract valid, assessed the amount of the respondent's recovery at \$175, and entered judgment in his favor for that sum. This appeal followed.

The sole question presented is whether a married woman, living with her husband, may make a valid contract with an attorney to prosecute an action in damages against one by whose negligence she has suffered a personal injury.

Rem. & Bal. Code, § 181 (P. C. 81 § 11), provides that, when a married woman is a party, her husband must be joined with her, except (1) when the action concerns her

separate property; (2) when the action is between herself and her husband; and (3) when she is living separate and apart from her husband. It further provides (Id., § 182) that husband and wife may join in all causes arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or out of any contract in favor of either or both of them. Construing these sections, we have repeatedly held that the husband is a necessary party to all actions arising because of personal injuries to the wife, if the parties were living together as husband and wife at the time the injury was received. *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701, and cases there collected. Indeed, our holding has been that the husband was the only necessary party to such an action. This on the principle that the claim of damages for the injury was community personal property of the spouses, and, since the statute (Rem. & Bal. Code, § 5917 [P. C. 95 § 27]), vests in the husband while living with his wife the management and control of such property, he has power to deal with it as if it were his separate property, which includes the right to maintain actions concerning it, the wife being only a proper party to such actions. *Dillon v. Dillon*, 13 Wash. 594, 43 Pac. 894; *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; *Harker v. Woollery*, 10 Wash. 484, 39 Pac. 100; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827; *Schneider v. Biberger*, *supra*.

From the foregoing it follows, we think, that the wife cannot make a valid contract with an attorney to prosecute an action for personal injuries although suffered by herself. Since the husband alone can maintain such an action, it must follow that he has the right to have a voice in any contract that affects the condition upon which the action is to be maintained. To hold otherwise is to hold that the husband's management and control of the community personal property is not absolute as the statute presupposes, but is subject to

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such contracts as the other spouse may choose to make concerning it. This, we think, is not the meaning of the statute.

Our attention is called to a number of cases where this court has recognized contracts concerning the community property entered into by the wife as obligatory upon the community, but in each of them we think there will be found some element of ratification or acquiescence on the part of the husband which estopped him from gainsaying the contract. Such was the fact in the case of *Williams v. Beebe*, 79 Wash. 133, 139 Pac. 867, although the court rested the decision, in part at least, on the ground that the wife could enter into a valid contract with relation to the community property; citing and relying upon Rem. & Bal. Code, § 5927 (P. C. 95 § 21). But this section of the statute, as we had theretofore uniformly construed it, relates to the separate property of a married woman, giving her power to contract with reference thereto as if she were unmarried, but not power to contract with reference to community property. This power of contract had been theretofore, in the same enactment, exclusively vested in the husband. *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732; *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870. Our expression in the case mentioned must be regarded as unfortunate, rather than as an authoritative determination of the question involved.

The respondent further argues that the evidence in the present case shows such an acquiescence in the contract by the husband as to estop him from repudiating the contract. We have examined the record with this thought in mind and think it does not justify the conclusion. It is shown that the husband had knowledge of his wife's action at the time he entered into the contract with Chester & Green, but we find nothing to show that he in any manner recognized or acquiesced in the contract after it came to his knowledge.

The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of the appellants, defendants below.

MORRIS, C. J., ELLIS, and MAIN, JJ., concur.

[No. 12805. Department One. February 7, 1916.]

M. J. KALEZ *et al.*, Appellants, v. SPOKANE VALLEY LAND & WATER COMPANY, Respondent.¹

NAVIGABLE WATERS—SHORE LANDS—TITLE OF STATE. Shore lands on a navigable lake between ordinary high water and ordinary low water belong to the state, where they were unpatented at the time of the adoption of the state constitution.

NAVIGABLE WATERS—SHORE LANDS—APPROPRIATION AND SALE—PRIORITY OF RIGHTS. Where state shore lands on a navigable lake were, under authority of the state, appropriated for irrigation purposes, a subsequent purchaser from the state takes with notice and subject to the appropriator's right to use them for purposes of irrigation by raising the lake to a higher level during the dry season.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 7, 1914, upon discharging the jury at the close of the evidence, dismissing an action in tort. Affirmed.

Robertson & Miller and *E. W. Hand*, for appellants.

Allen, Winston & Allen, for respondent.

MOUNT, J.—This action was brought to recover damages alleged to have occurred by reason of the overflowing of plaintiffs' lands by the defendant. The case was tried to the court and a jury. At the conclusion of all the evidence, the court discharged the jury and entered a judgment of dismissal. The plaintiffs have appealed from that judgment.

The facts are substantially as follows: Liberty lake is a navigable body of water in Spokane county. This lake

¹Reported in 154 Pac. 1097.

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has no natural outlet except at extreme high water, when it overflows at the north end through a small lake known as Loomis lake, toward the Spokane river. Liberty lake is fed by melting snows in the spring from the adjacent hills, and rises, at extreme high water, to a point 2,057 feet above sea level. Thereafter the water percolates, or evaporates, until late in the summer, when it reaches extreme low water at about 2,050 feet above sea level.

About the year 1900, the predecessors in interest of the respondent appropriated, under the statute, fifty cubic feet per second of time of the waters of Liberty lake for the purpose of irrigating lands on the plateau between the lake and the Spokane river. The respondent company has succeeded to the rights of the original appropriator.

In the year 1903, the respondent constructed a dam across Liberty lake at the point where Liberty lake flows into Loomis lake, the latter lake being nonnavigable. The purpose of this dam was to store the water in Liberty lake in the winter and the spring seasons for use in irrigation later in the summer. The top of this dam was constructed at about the point of ordinary high water in Liberty lake, and some two feet below extreme high water. The effect of this dam was to hold the water in Liberty lake for a longer period during the dry season than it would ordinarily maintain the higher level. The meander line of Liberty lake was fixed by the government at about the point of extreme high water.

The rights of the Northern Pacific Railroad Company to the upland bordering on this lake attached in the year 1884. In the year 1896, the plaintiffs purchased under a contract from the Northern Pacific Railroad Company fractional section 25, Twp. 25, N., R. 45 E. W. M., bordering on Liberty lake, and in 1900 received a deed from the railway company for the land.

In the year 1909, the commissioner of state lands in this state served a notice upon the plaintiffs that they, being the upland owners, would have sixty days preference right to

purchase shore lands on the lake. On January 8, 1913, the plaintiffs entered into a contract with the state to purchase the shore lands abutting upon the lake. These shore lands consisted of lowlands at the south end of the lake which, at extreme high water, are overflowed, but at low water are bare and may be used for cultivation.

The record shows that, before the dam was constructed, these low lands would become dry about the first of June, and thereafter crops would mature thereon. The plaintiffs have cleared the lands and have cultivated a part thereof. The effect of the construction of this dam, as stated above, was to cause the water of Liberty lake to be held for a longer period during the summer season upon these low lands, and the plaintiffs are thereby prevented from raising crops thereon.

The trial court, under these facts, was of the opinion that these lands were shore lands; and that, since the respondent, under the statute, had appropriated the waters of the lake for the purposes of irrigation, and that the state had, prior to the sale of the shore lands to the appellants, authorized the respondent to appropriate the shore lands between the limits of ordinary high water and ordinary low water for storage purposes, the use of the shore lands for that purpose was rightful, and that the plaintiffs were therefore not entitled to recover.

That Liberty lake is a navigable lake is now beyond question. It was so held to be in *Kalez v. Spokane Valley Land & Water Co.*, 42 Wash. 43, 84 Pac. 395; *Madison v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 5; and *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515. This being navigable water, it is plain that the shore lands between ordinary high water and ordinary low water were the property of the state. Const., art. 17. No claim is made that these shore lands were patented to any person prior to the adoption of the constitution. At any rate, there is nothing

in the record in this case to show any such patent. When it was shown, therefore, that the state had authorized the appropriation for the storage of water for the purposes of irrigation prior to the time the state sold the lands to the plaintiffs, the plaintiffs, of course, took with notice of that appropriation.

In *Kalez v. Spokane Valley Land & Water Co.*, *supra*, after holding that this lake was a navigable lake, this court, at page 48, said:

“The state would have the right to make such use of the water or of the bed of said lake as to it would seem proper, and could confer upon this respondent the rights of irrigation sought to be exercised by it, due regard being had to the rights of others. Were it made to appear that the dam or gates erected, or about to be constructed, by the respondent had or would raise the water above the ordinary high water line, and to the injury of appellants’ property, the court would doubtless furnish relief. . . . But in this case the court found, and properly, we think, that the respondent in retaining the water during the winter months as aforesaid, had not caused the same to raise above the line of ordinary high water mark, and that it had not in the summer time or at any time withdrawn a sufficient amount of water to lower the lake below the line of ordinary low water mark. These things being true, we think that the respondent has acted within its legal rights and that the appellants have no legal cause of complaint.”

The same is true in this case. The evidence conclusively shows that the dam in question is two feet below the line of high water, and at about the line of ordinary high water. The evidence also conclusively shows that the only effect of the dam is to maintain the water in Liberty lake for a longer period than it would naturally remain at the higher level, and that the use being made of the lake for storage purposes was within the lines of ordinary high water and ordinary low water.

In the case of *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945, in referring

to the *Kalez* case, *supra*, where it was stated that the government of the United States could not dispose of shore lands below the high water mark, but that such lands would become the property of the state under art. 17, § 2, of the state constitution, we said in referring to those statements:

“It is suggested that these remarks were largely dictum and not necessary in the decision of that case. There is some reason for that suggestion in view of the facts there involved. Nevertheless the view there expressed seems to be fully in accord with the views of the supreme court of the United States as expressed in *Shively v. Bowlby*, 152 U. S. 1. We are of the opinion that common law riparian rights in navigable waters, if it can be said that the common law recognized such rights, have not existed or been recognized in this state since the adoption of our constitution; at least so far as the upland owner having any right to occupy in any way the beds or shore lands of such waters or to take from such waters water for irrigation as against the state, its grantees, or those who have appropriated such water for purposes of irrigation in compliance with the laws of the state.”

It follows that, when the state authorized the respondent or its predecessors in interest to appropriate the waters of this navigable lake and the shore lands thereof for purposes of irrigation, and when the state sold the shore lands to the plaintiffs, it sold only the interest it then had. The plaintiffs acquired no greater right. They took the lands, therefore, subject to the right of the respondent to use them for purposes of irrigation. This use, if within the limits of ordinary high and ordinary low water, is a rightful use for which damages cannot be claimed.

We are satisfied, therefore, that the trial court was right, and the judgment is therefore affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 12848. Department One. February 7, 1916.]

THOMAS FREEBORN, *Respondent*, v. CHEWELAH COPPER
KING MINING COMPANY, *Appellant*.¹

APPEAL—RECORD—ABSTRACT. No abstract of the record is necessary in a case coming up on a transcript containing the pleadings, and of less than one hundred pages.

PLEADING—AMENDMENTS—NAME OF DEFENDANT. Where a complaint against the "Copper King Mining Company" was served on the president of "The Chewelah Copper King Mining Company" and the record clearly showed that it was the intention to sue the latter company, the court properly authorized an amendment of the complaint accordingly.

APPEARANCE — ANSWER AFTER AMENDMENT — SUFFICIENCY — JUDGMENT BY DEFAULT. Where, after amendment of a complaint as to the name of the defendant, defendant, in compliance with an order to elect, elected to stand upon its amended answer already filed, which contained a general denial, there was a sufficient appearance by the defendant; and it was error to grant a judgment for plaintiff by default.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered October 14, 1914, upon default of the defendant, in an action to foreclose labor liens. Reversed.

S. P. Domer, for appellant.

R. A. Thayer, for respondent.

MOUNT, J.—This is an appeal from a default judgment entered against the appellant. The respondent moves to dismiss the appeal because the appellant has not made an abstract of the record. The case comes up on a transcript containing the pleadings in the case and does not contain one hundred pages. No abstract was, therefore, necessary. The motion is therefore denied.

The action was begun to foreclose certain liens of laborers upon mining property alleged to be owned by the appellant.

¹Reported in 154 Pac. 1095.

The appellant was designated in the complaint as the Copper King Mining Company, a corporation. Service of the summons and complaint was made upon S. P. Domer, president of The Chewelah Copper King Mining Company, a corporation. After service of the complaint, Mr. Domer appeared as attorney and filed a demurrer to the complaint, and thereafter an answer; and later an amended answer, in which it was alleged that the Copper King Mining Company had been dissolved by operation of law by its failure to pay the state license, and that, prior to its dissolution, it sold and disposed of all its assets. The amended answer then denied all the allegations of the complaint.

Thereafter, upon showing made, the trial court permitted the complaint to be amended by inserting the words "The Chewelah" before the name "Copper King Mining Company," so that the complaint as amended was against "The Chewelah Copper King Mining Company, a corporation." Thereafter, upon motion of the plaintiff for default, the court ordered as follows:

"The Chewelah Copper King Mining Company, a corporation, is hereby ordered and directed to elect, and advise the court of its action, within five days from the date of this order, whether or not it will stand upon its original answer on file herein, or further plead in said cause; and in the event that said defendant fails to elect within the time herein specified, then in that instance said motion for default shall be granted, without further notice."

This order was dated October 7, 1914. Thereafter, on the 13th day of October, 1914. Mr. Domer appeared and filed an election to stand upon the amended answer theretofore filed in the case. Thereafter, on the next day, the trial court entered a judgment by default, from which this appeal is prosecuted.

It is strenuously argued by the appellant that the plaintiff has sued the wrong company; and authorities are cited that, in such a case, the complaint is of no effect and the court

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should have dismissed the action because it had no jurisdiction of the defendant. But in this case, while the defendant was named as the "Copper King Mining Company, a corporation," the record shows that the president of "The Chewelah Copper King Mining Company" was served; and it was clearly the intention of the parties to sue The Chewelah Copper King Mining Company. Under the showing which was made, we think the court properly authorized an amendment of the name; and that when the defendant, after being served and notified of the amendment, elected to stand upon the amended answer which had been filed, and which was a general denial, that was a sufficient appearance.

But we are satisfied the court erred in granting a default judgment. Before the default judgment was signed by the court, the appellant had on file an amended answer denying the allegations of the complaint. He had elected to stand upon that answer. In short, the issues were made up; and it was the duty of the court to set the case down for trial, and not grant a judgment by default under those conditions.

The judgment is therefore reversed, and the cause remanded for trial upon the complaint and amended answer.

MORRIS, C. J., CHADWICK, FULLERTON, and ELLIS, JJ., concur.

[No. 12992. Department One. February 7, 1916.]

DAVE BENN, *Respondent*, v. CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY, *Appellant*.¹

RAILROADS—INJURY TO ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The court cannot find, as a matter of law, that a freight train of sixteen cars, going twenty-eight to thirty miles an hour, could be stopped within a distance of six hundred and fifty feet, especially where all the evidence on the subject was to the effect that the engineer had immediately made every effort to stop the train and could not do so within that distance.

SAME—DUTY TO FENCE—STATUTES. A railroad company is not compelled to fence its depot and side tracks at a station outside of an incorporated city, under Rem. & Bal. Code, §§ 8730, 8731, requiring fencing outside of any incorporated city "and outside the limits of any sidetrack or switch" and requiring cattle guards at highway crossings "and at each end of such sidetrack or switch, outside of any incorporated city."

SAME—INJURY TO STOCK ON TRACK—FAILURE TO FENCE—PROXIMATE CAUSE. Where the law does not require the fencing of station grounds or switches outside incorporated cities, the want of a fence is not the proximate cause of the death of stock killed on the tracks within such grounds.

SAME—INJURY TO STOCK ON TRACK—FAILURE TO FENCE—NEGLIGENCE—PRESUMPTIONS. Under Rem. & Bal. Code, §§ 8730, 8731, requiring a railroad to fence its tracks and raising a presumption of negligence in the event stock is killed at a point where the track is not fenced, an omission to fence only makes a *prima facie* case of negligence which the company may overcome by evidence.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 29, 1915, upon findings in favor of the plaintiff, in an action for damages for stock killed by a railway train. Reversed.

Geo. W. Korte (*Morgan & Brewer*, of counsel), for appellant.

E. S. Avey, for respondent.

CHADWICK, J.—Appellant maintains a flag station known as Balch, in Chehalis county. The place is not incorporated

¹Reported in 154 Pac. 1082.

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and is no more than a station house and a loading ground which accommodates a side or passing track. At one end of this tract of land, which is two hundred by about nineteen hundred feet, there is a county road. At the other end is a fence with a cattle guard. The respondent was the owner of three colts which wandered from his field and were killed about three o'clock in the morning of November 1st, 1913, by a freight train belonging to the appellant.

The only question in this case is whether the engineer did all that he could do to stop his train before striking the animals. The station ground is approached on a slight curve. The colts were observed first by the fireman. At that time they were about two hundred feet in front of the locomotive. Because of the curve, they were not seen by the engineer until the engine had straightened out on the track. When observed by the fireman, he immediately called to the engineer, who shut off the steam and set the air. The testimony of the engineer and fireman would indicate that the colts ran about four hundred feet before they were overtaken. The train was a freight train consisting of sixteen cars, fairly light, and going at from twenty-eight to thirty miles an hour. The court below held, as a matter of law, that the engineer should have stopped the train within six hundred or six hundred and fifty feet, and that, if he had done so, the stock would not have been injured. A judgment for the value of the colts was entered in favor of the respondent.

There was no testimony tending to show within what distance a train, running at the rate mentioned, could have been stopped so as to avoid the injury. While it is possible that a court would be warranted in holding that a train could be stopped within a distance so great that the minds of reasonable men would not differ upon the question, we cannot so hold in this case. Where a fact depends upon the application of some scientific principle or upon the use, or the consequences of the use, of machinery which requires

skillful operation or manipulation, courts rarely ever indulge a presumption of law or compel a conclusion of fact, in the absence of positive testimony to sustain it. The only testimony in the case going to this point is that of the engineer. He said, in reply to the question:

“Q. In what distance can you stop with that size train, running at that rate of speed? A. Freight trains, some trains would stop in five hundred feet, while fifteen hundred feet it would take to stop others. The breaking power on freight trains is very variable and hard to state; but on a rule a thousand feet.”

But, granting that the stopping of a freight train consisting of a locomotive and sixteen cars, going at about thirty miles an hour, is a matter of which the courts and, as is contended by respondent, juries, will take notice and find of their own knowledge, or, in other words, treat as a matter of legal conclusion or inference, we have found at least one case where it appears that a train consisting of a locomotive and two passenger coaches, going at six or eight miles an hour, could be stopped in from one hundred and fifty to two hundred feet; at thirty-five miles an hour, in from seven hundred to eight hundred feet. See *Anderson v. Chicago, St. P., M. & O. R. Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203.

Counsel relies on *Timm v. Northern Pac. R. Co.*, 3 Wash. Terr. 299, 13 Pac. 415. Here the train consisted of sixty or seventy cars loaded with coal.

“What was the description of the train otherwise, or of the whistle blast, or of the railway grade, or of the engine, or how far from the cattle the train was when they could have been first sighted from it, or within what space the train could have been stopped, or how the speed of the train after sighting the cattle, or as it neared them, was as compared with its speed before, does not transpire.”

Although negligence is not to be presumed, and it was not by any means clear that the engineer was in fault, the court, after a *consideration of the evidence, assumed* that the train

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might have been stopped within the space of two hundred and seventy yards, which is eight hundred and ten feet. It is proper to draw conclusions from established or admitted facts and, possibly, in the absence of all testimony, from the physical facts; but courts cannot supply the want of facts by resort to assumptions or hypothesis. In any event, the court did not *assume* to decide the question by resort to judicial knowledge, and the case can have no bearing where, as in this case, a reasonable effort, or rather an effort that is not shown to be unreasonable, was made to stop the train.

After finding that a train could be stopped within a distance of six hundred and fifty feet, the trial judge says:

“The employees of defendant company in charge of the engine evidently expected the horses would run off at the side of the track and did not exercise the proper caution and were negligent in not stopping the train within that distance.”

We found nothing in the testimony, and we have read it all, to sustain the finding that the employees of appellant evidently expected the horses would run off on the side of the track. On the contrary, the engineer testifies that he endeavored to stop and that, if he had had another one hundred or one hundred and fifty feet to go, he would not have come in contact with the animals at all, that he could think of nothing he had left undone, and that he was mindful of the danger to himself and his fireman in striking the stock.

The only thing we find in the record which could have misled the court is the following:

Q. “Isn’t it a fact that, although you don’t aim to hit the stock, sometimes you like to give them a chase down the track? A. Not at that speed; because we might get the benefit of the fun. Q. Have you ever been ditched that way? A. No, but I have helped pick up fellows that was. I have heard of bulls butting engines off the track. Q. You feel quite sure that you did everything that you could do to avert that accident? A. I did.”

Respondent suggests in his brief that, notwithstanding the grounds upon which the case was made to rest, appellant

is liable under the statute, Rem. & Bal. Code, §§ 8730, 8731 (P. C. 433 §§ 89, 91), in that Balch station is not an incorporated city or town and it was, therefore, the duty of the company to fence its track. The statute reads:

“Every person, company or corporation having the control or management of any railroad shall, within six months after the passage of this act, outside of any corporate city or town, *and outside the limits of any sidetrack or switch*, cause to be constructed and maintained in good repair on each side of said railroad, along the line of said right of way of such person, company or corporation operating the same, a substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, *and on each side of such crossing and at each end of such sidetrack or switch, outside of any incorporated city or town, a sufficient cattle-guard*: Provided, that any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient.”

We have italicized the part relied on. We confess our inability to understand the meaning of the italicized words. They cannot mean that a cattle guard is required at each end of every switch outside of an incorporated city or town, for “such” switch is the switch first mentioned in the act and it is, by express words, exempted from the fence features of the law. It follows, if a company is not required to fence its depot or side tracks or switch, that a cattle guard at the end of each switch would serve no purpose. Indeed, we cannot imagine a condition calling for the application of the words relied on. There being no law compelling the company to fence its side tracks, the conclusion follows that the want of cattle guards was not the proximate cause of the injury.

The statute is unavailing to respondent for another reason. An omission to comply with its terms does no more than to put the company under a rule of evidence, that is, to

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meet a *prima facie* case, or a presumption of negligence in the event that stock is killed at a point where the track is not fenced. Granting that respondent made out a *prima facie* case, we think that appellant overcame it and should prevail.

Reversed and remanded with directions to dismiss.

MORRIS, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 13134. Department One. February 7, 1916.]

DAISY D. IMLER *et al.*, *Appellants*, v. NORTHERN PACIFIC
RAILWAY COMPANY *et al.*, *Respondents*.¹

RAILROADS—LICENSEE ON TRACK—DUTY OF COMPANY. A railroad company owes the duty to a licensee walking upon a track pursuant to an established custom to keep a reasonable lookout in advance, and a reasonable effort to avoid injury after discovering his presence on the track.

SAME—LICENSEES—DOUBLE TRACK—RUNNING AGAINST TRAFFIC. A railroad company's duty to a licensee upon the track to keep a reasonable lookout and make reasonable effort to avoid injury after discovering his presence does not require the company to run its trains on a double track in the customary direction, and such a licensee may not assume without looking that trains will not be run "against traffic."

SAME—LICENSEES—NEGLIGENCE—FAILING TO DISCOVER PRESENCE. Where a licensee was not shown to have been walking on the track, and may have stepped from the right of way directly in front of the engine, negligence in failing to discover his presence cannot be imputed to the engineer from the fact that he had an unobstructed view of the track.

Appeal from a judgment of the superior court for Thurston county, Claypool, J., entered March 31, 1915, upon granting a nonsuit, dismissing an action for wrongful death, tried to the court and a jury. Affirmed.

¹Reported in 154 Pac. 1086.

Hugo Metzler, Ben S. Sawyer, and Gordon & Easterday,
for appellants.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondents.

CHADWICK, J.—Joseph Imler, while walking along the track of the defendant railway company on the evening of the fourth of November, 1912, was struck and killed by one of the defendant's work trains. The place of the accident was between the stations of Centralia and Bucoda, where the company maintains a double-track railway which is fenced and guarded at all proper places with cattle guards.

Imler had been at work during the day at a farm about a mile and a half south of Bucoda, where he lived. He left the place of his employment about dusk and followed a road or footpath to the right of way of respondent company. He entered on the right of way either through, or by climbing over, a gate which had been left for the convenience of the owner of the land, the place having been formerly maintained as a private crossing. The crossing had been abandoned about three years before when the company double tracked its road. The gates had not been removed. Imler had apparently gone but a short distance in the direction of Bucoda when he was struck and killed.

The testimony shows, notwithstanding the fact that respondent maintained a double-track railroad, a part of its transcontinental system over which some forty trains passed each way every day, and with the track properly guarded, that the people in the neighborhood had for a long time been accustomed to use the right of way and the tracks as a footpath in going to and from their homes situated near the tracks. At times some had ridden bicycles along and between the tracks. One witness testifies that he had ridden a motorcycle, and another that he had seen a man riding along the tracks on horseback.

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It is contended by the appellants that the use of the tracks and the right of way by the public in the manner indicated had continued for so long a time that a license to use the tracks as a footpath is implied, and respondent did not use that degree of care which it owed to deceased as a licensee and is liable to answer in damages.

Negligence is charged in that respondents' train was running against traffic, that is, running north on the south-bound tracks; that the headlight was not burning or was so defective as to give no warning; that the train was running at an excessive rate of speed (the testimony does not sustain a finding that it was running more than thirty-five miles an hour); that, at the time of the happening of the accident, a north-bound passenger train equipped with a powerful electric headlight, and with cars and coaches brilliantly lighted, was going north on the north-bound track; that the lights from the passenger train sufficiently lighted the track and that portion of the right of way upon which the deceased was walking to enable the engineer and fireman to see and observe him in time to give him warning of his peril; and further, that the noise and light caused by the passing of the passenger train held the attention of the deceased, and he relied upon the fact that the west track was habitually used by south-bound trains, and was induced to believe that the south-bound track was, and would be, free and clear of obstructions from behind, and the light and noise and confusion of the passenger train made it impossible for him to hear and discover the approach of the work train.

It is shown that deceased was about forty-five years of age, in the possession of all of his faculties, and had, at one time, been a section hand working along the track where he was killed, and hence had knowledge of the frequent use of the tracks. As material to the history of the case although not a fact essential to our holding, there was a public highway leading into Bucoda at about the same distance from the place where the deceased was working as was the railroad

track. At the close of plaintiff's testimony, the trial judge took the case from the jury and entered a judgment of nonsuit.

Much of the briefs are taken up with the discussion of the inquiry as to whether deceased was a trespasser or licensee. We shall not inquire whether deceased was a trespasser. We shall assume that he was a licensee, although it may well be doubted whether any person can claim a license to use a railway track, more especially the double-track of a transcontinental system over which trains run with great frequency, as a footpath where, as in this case, the track is laid in the open and between stations and is fenced and guarded. Under such circumstances, it has been held that a use, however long continued, will not imply a license. *Burg v. Chicago, R. I. & P. Co.*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419; *Ward v. Southern Pac. Co.*, 25 Ore. 433, 36 Pac. 166, 23 L. R. A. 715. And such would seem to be the logical result of the opinion of this court in the case of *Hamlin v. Columbia & Puget Sound R. Co.*, 37 Wash. 448, 79 Pac. 991, and *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32. The duty of a railroad company to a licensee is defined in the case of *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526, as follows:

"In the case of the licensee the company when moving trains is charged with the additional duty of being in a state of expectancy as to the probable presence of persons upon the track at places where travel thereon is known to be customary and frequent. The care required in the case of the licensee, therefore, calls for both reasonable lookout in advance and a reasonable effort to avoid injury after presence is discovered."

The determinative question is, therefore, whether the engineer and fireman, or either of them, discovered the presence of the deceased and his peril in time to avoid the accident.

There is no testimony that would warrant us in holding that respondents' agents were remiss in the performance of

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their duty to the deceased, that is, to keep a lookout and avoid any wanton or willful injury. The engineer testifies that he was keeping a lookout, and that he did not see the deceased until just the moment he was struck. This is not disputed by the testimony of any one, nor do we find the physical or admitted facts to be contrary to his declaration.

In *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385, a recovery was denied under the following state of facts:

"He is not at a street crossing, but purely for his own convenience is walking on the track from Sixteenth to Twentieth street; and, seeing a train moving towards him on the track on which he is walking, he steps upon the next track; and being blinded by the headlight of the engine approaching, and his hearing dulled by it, or more likely because he did not look for a train on the track to which he stepped, he is scarcely on that track before he is struck by a train which is being backed from the depot to the shops, receiving injury, from which he dies in about an hour. No one questions that the company was simply exercising on ground belonging to it, its lawful business, and that the deceased was not in the public highway, but using the track for his own convenience, when he could have used a walk or path but a few yards distant, outside the tracks, or an alley but a short distance further away. What duty did the company owe him under these circumstances except that it should not wilfully or wantonly hurt him? Where could the deceased have found a more deadly, dangerous walk? And he was fully aware of this, for he was an employe of the company, was well acquainted with the yard and works of the company there, but not in service in the yard nor on duty then or there. Indeed, his daily contact and familiarity with the railroad operations lulled him into a feeling of security and negligence which cost him his life, when but twenty-one or twenty-two years of age. He was in possession of all the natural senses and faculties which tell of danger, and aid us in self-preservation amid perils surrounding us."

Although there is no testimony to sustain it, we think the assumption of appellants, as set forth in that part of their complaint describing the presence of the passenger train, is

a fair theory of the immediate circumstances and conditions. The deceased was evidently on the west side of the west track when struck, for the bruises on his body indicate that he was struck just above the hip by the pilot beam. At the time, the two trains were running nearly parallel, and the deceased must have assumed that the passenger train was the only train approaching, and there being an utter absence of testimony that he had been walking for any distance on either track, he must have stepped up on the ties immediately in front of the work train without looking, resting upon the assumption that a train on the west track, if any, would come from the north and not from the south. It follows that the only contention that can be advanced with any show of reason is that respondent was bound to operate its trains "with traffic" in all instances, and that licensees may rest secure in the belief, and act upon it without looking, that all trains will move in the customary manner. Whatever the rights of a licensee may be, railroad tracks are laid for the convenience of those who operate them and the public which employs them and those who ride upon their cars. A licensee cannot, from the nature of things, having in mind the public duty of the carrier, assume that a railroad company will not, or may not, use its property as will best serve, or as may be necessary at times to serve, its primary purposes. It cannot be held guilty of negligence if, in the performance of its functions as a public carrier, it suspends its own rules for the time being for the movement of its trains and sends a train forward against traffic. We might as well hold that a train running ahead of time or behind time would have to flag its way to protect those who were accustomed to use its track as a foot-path in country districts. For, if appellants' theory be good, a licensee might as well rest under the assumption that if a train did not pass the point of his use at a given time, or upon schedule time, it would have no rights which he was bound to respect or to take notice of.

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In all cases, then, we come to the one question, whether the company kept a lookout, and whether the presence of the licensee was discovered in time to prevent the accident. As we have said, the testimony in this case not only does not sustain such a finding, but is contrary to it. The fact is apparent and conclusive that the deceased acted upon the assumption that but one train was approaching from the south and that the west track was clear. Such assumptions find no favor in the law. A similar contention was made in *Boulden v. Louisville & N. R. Co.* (Ky.), 112 S. W. 936. The court there held that the company had a right to run its trains on either of the two tracks.

"The court properly instructed the jury that the defendant had the right to use either track, as otherwise they might have thought it negligent for the defendant to run the train in question on the east track. Persons who walk along a railroad track are under obligations to keep out of the way of trains, and they cannot complain that the train is run on one track and not on another. There was nothing in the plaintiff's conduct to apprise the operatives of the train that he was ignorant of its approach, or to impose upon them the duty of taking extra precautions for his safety, until he, without looking back to see if the train was coming, suddenly placed himself in peril when the train was right upon him."

See, also, *Morgan v. Northern Pac. R. Co.*, 196 Fed. 449.

In *Northern Pac. R. Co. v. Jones*, 144 Fed. 47, instead of running against traffic, a train was running off its schedule. The court in holding that the company was not negligent in so operating its trains, said:

"In *Louisville & N. Ry. Co. v. McClish*, it was said: 'Even in the case of a licensee, there is, under such circumstances, the highest duty to exercise the utmost degree of vigilance in looking out for approaching engines or cars. . . . The track is the property of the railroad company, which it has the legal right to use at any and all times.'

"The rule is well established that it is the duty of a traveler to stop and look and listen before crossing or walking

along a railroad track. He has no right to assume at any time of the day or night that trains will not be run over the track. *Railroad Company v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago & St. P. Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Northern Pacific Railroad v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

"Said the court in *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 248, 14 Sup. Ct. 85, 37 L. Ed. 1068: 'The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.'

"The defendant in error was a miner of the age of 34 years, and was in the full possession of his senses. According to his own testimony, he walked upon the railroad track a distance of more than half a mile without once looking back or stopping to listen for an approaching train. In so doing, it must be held that he was guilty of gross negligence, which, irrespective of negligence in the failure of the engineer to discover him on the track, is sufficient to bar his right of recovery. It was no excuse for his failure to take such precautions that the wind was blowing in his face, or that the noise of a waterfall may have deadened the sound of an approaching train. Those circumstances only render the use of his senses the more imperative. It was his duty continually to exercise vigilance."

We attach no importance to the contention that the headlight on the train was not burning, or was so dim as to afford no protection to the deceased. There is no testimony even tending to show that the lack of a headlight or its defective character was the proximate cause of the injury. Appellants' testimony shows that the electric headlight of the passenger train illuminated the track and the right of way. Another headlight would have added no security to the deceased.

Appellants rely principally on the cases of *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R.

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A. 855; *Northern Pac. R. Co. v. Baxter*, 187 Fed. 787, and *Great Northern R. Co. v. Thompson*, 199 Fed. 395, 47 L. R. A. (N. S.) 506. These cases, like many that might be cited, are either crossing cases or cases from cities and towns where population is congested and the public have been accustomed to cross the tracks or to use them as a thoroughfare. Recoveries are allowed in such case because a higher duty rests upon a railroad company under such circumstances. In moving trains over and across the streets of cities, or through depot grounds or in switch yards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. This is a condition which is generally compelled or regulated by statute or ordinance. But we do not find it to be so held in any of the cases where, as in this case, a fenced and guarded track was used, not as a crossing, but as a footpath, in the country and between stations.

The crossing cases may be further distinguished. They rest in implied license upon legal grounds as differentiated from the acts or conduct of the parties as they may arise in a particular case. In consequence, a duty is put upon the court in all such cases to measure the relative rights as well as the relative obligations of the parties to the action. The company is held to a rule of strict accountability, because it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so. Whereas, one who walks along a railroad track using it as a footpath, especially where the track is in the country and fenced, cannot claim the protection given to those who do things of necessity, for, from the very nature of things, he is using the track for his personal comfort and convenience. Men must, and therefore may, move from one side of a track to another at places established by the company, or so long used by the public as to imply a license, resting under the as-

sumption of legal right. But the one who does not cross but loiters, or crosses the barriers that have been erected to warn him and save him from the consequences of his folly, can claim no more than that he shall not be wantonly or willfully injured if his peril is discovered in time to prevent his injury. The cases all rest in the same sound principle which controls every exploration into the law of negligence—that is, that the degree of care in every case shall be measured, not by any abstract rule, but by reference to the facts and circumstances attending the particular case.

There is no merit in the contention that the respondents' engineer had an unobstructed view of the track for more than a mile and should have discovered the peril of the deceased. There is no evidence that deceased was on the track, and we cannot hold, as a matter of law, that the engineer was bound to anticipate that a man walking along the right of way would step in front of a railway train without exercising any care for his own safety.

Affirmed.

MORRIS, C. J., FULLERTON, MOUNT, and ELLIS, JJ., concur.

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Statement of Case.

[No. 11346. Department Two. February 9, 1916.]

**ELIZABETH O'DONNELL, *Respondent*, v. HUGH MCCOOL *et al.*,
Appellants.¹**

APPEAL—RECORD—ABSTRACTS—STATUTES. An abstract of the record is not required in a case where the appeal was taken before the statute requiring the service of abstracts went into effect.

PLEADING—CAUSES OF ACTION—REQUIRING ELECTION — DIFFERENT THEORIES. In an action to quiet title, plaintiff should not be required to elect between a claim of ownership in land through open, notorious, and adverse possession for the statutory period and a claim of ownership based upon the payment of the purchase price although title was taken in the name of another; since there is no inconsistency and both lead to ultimate title resulting in one and the same judgment, and not to a choice of remedies.

ADVERSE POSSESSION — HOSTILE POSSESSION — NECESSITY. Adverse possession of land originally occupied under some arrangement with the holder of the legal title is not established where during the entire statutory period, the plaintiff recognized the title holder's right to pasture stock on the land, her letters apparently recognized some joint interest, and she acquiesced in his payment of taxes and the last payment on the purchase price.

TRUSTS—RESULTING TRUSTS—PAYMENT OF PURCHASE PRICE. A resulting trust from the fact that one party furnished money for the purchase price of land, title to which was taken in another, cannot arise as to the whole title, where the entire purchase price was not so paid by one party.

SAME—RESULTING TRUST—PAYMENT OF PART OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A resulting trust to an aliquot part of a tract of land arises where it appears that defendant, having paid \$800 for a relinquishment, placed plaintiff and her husband in possession, that they furnished defendant \$840, with which to buy the land, and placed valuable improvements thereon, and that the parties recognized common interests in each other; as there may be a resulting trust in land to a part less than the whole; and it is not unreasonable, after the lapse of time, where there can be no absolute certainty as to the exact proportions each invested, to conclude from the circumstances that the parties intended to invest in equal moieties.

Appeal from a judgment of the superior court for Stevens county, Sullivan, J., entered February 5, 1913, in favor of

¹Reported in 154 Pac. 1090.

the plaintiff, in an action to enjoin a foreclosure sale and to quiet title, tried to the court. Modified.

Pedigo & Smith, for appellants.

Peacock & Ludden and *Samuel Douglas*, for respondent.

FULLERTON, J.—This is an action instituted by Elizabeth O'Donnell against Hugh McCool, Mary McCool, his wife, and The First National Bank of Walla Walla, to restrain the sale under a decree of foreclosure of certain real property situated in Stevens county, and to quiet the plaintiff's claim of title to the property. From a judgment in favor of the plaintiff, the defendants appeal to this court.

The facts, as we gather them from the record, are in substance these: The lands in question lie within the belt and form a part of the lieu land grant made by the government of the United States to the Northern Pacific Railroad Company. In the summer of 1891, the land was occupied by one Hughes, who had made certain improvements thereon. The appellant Hugh McCool, desiring the property, purchased Hughes' improvements and his possessory or "squatter" right for the sum of \$800, paying a part of the purchase price in cash and giving his note, payable at a future date, for the remainder. In the fall of the same year, McCool met the respondent and her husband, who were then with their family camping on a small creek near the land in question. They were searching for a tract of land which they could homestead or purchase. The husband of the respondent and McCool were first cousins, and had formerly been neighbors in the county of Walla Walla. On learning their errand, McCool suggested that they move onto the land that he had recently purchased of Hughes. On the next day McCool and O'Donnell rode over to look at the land, and shortly thereafter O'Donnell moved thereon with his family. No writing passed between the parties evidencing the conditions under which possession of the property was given O'Donnell, and

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the living witnesses (O'Donnell, the husband, having since died) have no very distinct recollection of the conditions. Mrs. O'Donnell testified that they purchased the property from him, while McCool testified that he merely "let them take it if they would care for any stock I had there, and keep up the ranch." It is in evidence, however, that O'Donnell had at that time a considerable sum of money on deposit with the Big Bend National Bank of Davenport, and that he gave McCool privilege to draw upon the deposit to the extent of \$900. Canceled checks in the record show that he drew upon the fund to the extent of \$680, and while McCool testifies that this is all he received from the fund, Mrs. O'Donnell produced a check for an additional \$200, drawn by her husband payable to himself, which she says was drawn for McCool's use, and the money paid over to him. These checks were all drawn during the fall of the year 1891.

After taking possession of the land, the O'Donnells, within the next few years, placed valuable improvements on the property. They fenced the entire tract, erected a nine-room house thereon, built a substantial barn, a stock shed and other outbuildings, planted an orchard of fifty or sixty fruit trees, and cleared, broke the sod, and placed under cultivation some seventy-five acres of the remaining land; improvements valued by the witnesses at from \$2,500 to \$3,500. The respondent and her husband resided upon and maintained possession upon the land until his death in 1898. Since that time the respondent has maintained such possession, actually residing upon the land for the entire period, except some four years and a half between 1902 and 1908, when she resided upon a homestead she had entered upon government land.

On May 1, 1896, McCool entered into a contract with the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the purchase of the land. The consideration named in the contract was \$640, to be paid in annual partial payments extending over

a period of ten years. The final payment was not made, however, until the year 1909. At that time McCool was indebted in considerable sums to the appellant First National Bank of Walla Walla. The bank also seems to have advanced to him the money necessary to make the final payment. But be this as it may, the deed from the railway company for the land ran directly to the bank as security, as both McCool and the bank concede, for the indebtedness at that time owing from McCool to the bank.

McCool paid all of the taxes assessed against the property from the time the O'Donnells moved thereon until the year 1909. He also testified that he had repaid all of the money advanced him by O'Donnell, although his testimony in that respect is disputed by Mrs. O'Donnell. During the first years of the O'Donnells' occupancy, McCool pastured a number of cattle on the premises and the surrounding country which were fed and cared for by the O'Donnells during the winter season; and during the entire period he has pastured work horses and saddle horses thereon, which were likewise cared for by the O'Donnells, some of such horses being on the premises at the time of the trial.

In 1902, James O'Donnell, a son of the respondent, wrote McCool inquiring what he wanted for the ranch, saying, "If you don't want too much I'm going to try to buy it." In 1909, the construction of a high school building was contemplated in the school district of which the premises formed a part, and considerable interest was manifested by the people of the district as to the place of its location. One of the sites selected as suitable was near the boundary of the premises, and one of the objections to the selection of the site seems to have been the lack of water. To overcome this difficulty, Mrs. O'Donnell proposed to allow them to pipe water from a spring arising on the premises, and to that end she wrote a letter to McCool, dated August 31, asking him to consent to a grant of the privilege. In the letter she says:

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"I am writing you in regard to our consolidated High School. I would like very much if you [could] be here on the 13 of Sept. to vote where it [is] to be located. There are two sites at Fruitland, one joins this place, . . . and the only drawback is the water. Hugh, if you can't come, if you will give me the privilege to give enough water for the school house, I think we will get the school . . . We will never miss the water they will take for the school house, . . . they haul water all the time for to drink from here. The well water is not good, that is why they want water from the spring. I know if you were here you would let them have it. . . . Let me know before the 13 of Sept. & try & come if you can. It is money in our pockets."

It is true Mrs. O'Donnell denies writing certain of the sentences we have quoted, but in this we are afraid she has not been entirely frank. Before her attention was called to the contents of the letter, she admitted that the signature to the letter was hers and that the letter was in her handwriting. Unfortunately the original was lost during the course of the trial and the letter is in the record by copy, and we have not the privilege of personally inspecting it, but neither she nor any one else pretends to say that the objectionable sentences were interlined, or that they appeared to be in a different handwriting from that of the main body of the letter, which she admits having written. Without further comment, it is sufficient to say that we have no doubt of the genuineness of the letter. In the record is another letter which was written by a son-in-law of Mrs. O'Donnell concerning the same matter. In this letter he speaks of the premises as property in which McCool has an interest; saying that he writes at the request of the directors of the different school districts interested, as they wished to know what he would ask for the right to pipe water from the spring on the premises to a contemplated school building.

On October 7, 1911, the appellant bank began an action to foreclose the lien evidenced by the deed to it from the railway company, alleging the deed to be a mortgage. To

this action McCool and wife alone were made parties defendant, and (McCool and wife making default therein), a decree of foreclosure against them was entered directing a sale of the property. An order of sale was issued on the decree, when the present action was instituted for the purposes and with the result before stated.

The respondent has moved to dismiss the appeal, basing her motion on the fact that no abstract of record was served on the respondent at or before the time he was required by statute to serve his opening brief. But an examination of transcript will show that the appeal to this court was taken before the statute requiring the service of abstracts went into effect. The statute did not in terms purport to apply to pending appeals, and this court construed it, when formulating rules of procedure under it, as not so applying. We are still of the opinion that the construction put upon the statute was correct. The motion therefore must be denied.

It is the appellants first contention that the complaint of the respondent sets forth two inconsistent theories; the one founded on the doctrine of adverse possession, and the other on the doctrine of a trust resulting from the payment of the purchase price. At the opening of the trial, they moved the court to require the respondent to elect upon which of these theories she would proceed. The court denied the motion, and its ruling in that behalf constitutes the first error assigned. But we think the ruling without error. Conceding that the facts set forth in the pleading justified the plaintiff's claim of title to the property in issue, first, on the ground that she had been in the open, notorious and adverse possession of the property under a claim of right for the period of the statute of limitations, and, second, on the ground that she had paid the purchase price of the property although title was taken in the name of another, no rule of law prevents her from introducing evidence tending to show both state of facts. Both could be true, and to prove the one she was not compelled to contradict the other. The

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ultimate inquiry was the ownership of the property, and there is no inconsistency in urging different sources of title, all of which lead to ultimate title in the plaintiff and result in one and the same judgment. It is not a case of an election of remedies. This doctrine applies only to cases where the plaintiff has a choice of remedies arising out of the same state of facts; a familiar example of which is a breach of a contract to perform some specific undertaking, where the party injured may choose between the remedy of damages and the remedy of specific performance. All of the cases agree that the two remedies cannot be pursued concurrently in the same action, or even concurrently in separate actions; but no case that has been called to our attention holds that a plaintiff may not plead and introduce proof upon different states of facts to establish the ultimate issue, although the facts may call for the application of different principles of law. Such was our holding in *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023, where it is said:

“In their complaint the plaintiffs based their right or title to the water on three grounds: (1) As riparian owners on the water course through which the water flowed; (2) as appropriators; and (3) under the contract as above set forth. The defendant moved the court to require the plaintiffs to separately state their several causes of action, and later to require the plaintiffs to elect on which of their several causes of action they intended to rely. These motions were properly denied. In actions to recover or establish rights in property, each independent source through which a plaintiff claims does not constitute a separate cause of action. The ultimate facts upon which the plaintiffs relied for a recovery in this case were their right or title to the water and the defendant's wrongful interference therewith. This cause of action was one and indivisible, regardless of the sources through which the plaintiffs might claim.”

See, also, *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104.

The trial court made no findings of fact on the merits of the case, and we have been unable to gather from the record the precise ground upon which the decree was rested. Two possible grounds are suggested on which the decree may rest, that of adverse possession and that of a resulting trust. It is on the first of these that the respondent's counsel principally rely to sustain the decree, and this claim we shall first notice.

Undoubtedly the respondent has been in possession of the premises for a sufficient length of time to cover the period of the statute of limitations, and it may be conceded that her possession has been open and notorious. But these conditions alone do not satisfy the statute. In this state possession of real property to ripen into title must not only be open and notorious, but it must be under color of title or claim of right and adverse to all other claimants. The facts recited, we think, conclusively show that the respondent's possession of this property has not been adverse to McCool. Not only has she recognized, during the entire period of her possession, his right to pasture stock upon the premises, but her letter of August 31, 1909, from which we have quoted, clearly shows that she then thought that he had such an interest in the property as to prevent her from conveying full title to the water arising thereon for the use of the contemplated high school. The letter of her son, written some years before this period, and the letter of her son-in-law, written during the period, bear evidence that her immediate family did not understand that she claimed to be, or was, the sole owner of the property. True, none of these letters recognize an absolute ownership in McCool—that of the respondent, since she speaks of the contemplated grant as being “money in our pockets,” and the water taken, as “water we will never miss” indicates rather a joint or common interest than absolute ownership—but there is, nevertheless, in each of them, a recognition of some interest in

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McCool, and any such recognition is contrary to a claim of adverse possession to the whole of the property. The fact, also, that McCool only recently paid that part of the purchase price of the land necessary to acquire title from the railway company, and paid the taxes on the whole of the property for the entire period of the respondent's possession, with respondent's acquiescence and knowledge, is also very persuasive of the conclusion that the respondent had not made it clear to McCool that her possession was adverse to his interests. Our conclusion is that the decree cannot rest on the rule of adverse possession.

Nor do we think the decree can be rested in its entirety on the alternative ground suggested by the respondent. A resulting trust is a trust implied by law from the transactions of the parties. It never arises out of contract or agreement that is legally enforceable, "but arises by implication of law from their acts and conduct apart from any contract, the law implying a trust where the acts of the party to be charged as trustee have been such as are in honesty and fair dealing consistent only with a purpose to hold the property in trust, notwithstanding such party may never have agreed to the trust and may have really intended to resist it." 39 Cyc. 104. While such a trust may arise from other transactions, it has its most frequent application to transactions where one party pays the purchase price of property and title thereto is taken in another. In the case before us, if there is a resulting trust at all, it arises in this latter way. But in any view of the evidence, it is clear that neither the respondent nor her husband nor both together paid the entire purchase price of the property. There could not, therefore, be title in respondent, in virtue of a resulting trust, to the whole of the property.

But there may be a resulting trust in land to a part less than the whole. *Croup v. De Moss*, 78 Wash. 128, 138 Pac. 671. When one party makes an oral contract with another

that the latter shall buy a specific tract of land on their common account, furnishing him with an aliquot part of the money required for the purpose, and he purchases the property, but in violation of the agreement takes the title in his own name or in the name of a third person, a trust results in favor of the first person for such aliquot part. *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645. The evidence convinces us that such was the condition here. McCool had paid \$800 to procure the release of Hughes. The sum of \$640 was required to procure the interest held by the railway company. O'Donnell placed to McCool's use \$900. Of this sum McCool concededly applied to his use \$640, and there is reason to believe that he so applied \$200 more. In addition to this, O'Donnell entered into possession of the property and at once began to place thereon, and within a short time did place thereon, valuable and permanent improvements. The parties have, also, down to a very recent period of time, recognized common interests in each other in the property. It is not reasonable to suppose that all this was done with the idea that O'Donnell was to be the mere tenant at sufferance of McCool. On the contrary, the transactions carry the idea of permanent rather than transient interests. After this lapse of years it cannot, of course, be known with absolute certainty the exact proportions each of the parties invested in the purchase price of the property; but looking to the indisputable evidence, not regarding too closely that depending upon the uncertain memories of the parties, the mind is led to the conclusion that the parties intended to invest therein in equal moieties. That the amounts were very nearly equal we think is proven, and that it is no injustice to either of the parties to so regard it. A trust, therefore, results in the respondent for an undivided half interest in the property.

The conclusion reached requires a modification of the judgment. The title to an undivided half interest only should have been quieted in the respondent, and a sale per-

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Syllabus.

mitted as to the other undivided half. The decree is reversed, and the cause remanded with instructions to modify the decree accordingly.

MORRIS, C. J., MAIN, and ELLIS, JJ., concur.

[No. 12216. Department One. February 9, 1916.]

LOUIS OLSON, *Respondent*, v. SELDOVIA SALMON COMPANY,
Appellant.¹

ABATEMENT AND REVIVAL — PRINCIPAL AND SURETY — SUPERSEDEAS BOND—DEATH OF SURETY. The liability of a surety upon a supersedeas bond is continued after his death, by Rem. & Bal. Code, §§ 193, 236, 967, providing that in certain cases where actions shall be prosecuted against the party if living, the same may be prosecuted against his representatives, which statute abrogates the common law rule that the death of a surety jointly liable with the principal ends the obligation as to both past and future defaults.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—DEATH—APPEAL—SUPERSEDEAS BOND. The death of a surety upon a supersedeas bond does not revoke the contract of suretyship as to costs subsequently arising; since the obligation was one that the surety could not withdraw from upon notice.

SAME—REMEDIES OF CREDITOR—DEATH OF SURETY—EXHAUSTION OF PRINCIPAL LIABILITY—APPEAL—SUPERSEDEAS BOND. Since a surety upon a supersedeas bond is liable upon the bond in the first instance as a principal obligor, the representatives of a deceased surety cannot demand that the obligee first exhaust his remedies against the principal debtor and a living co-surety.

APPEAL AND ERROR — SUPERSEDEAS BOND — SUMMARY JUDGMENT—DEATH OF SURETY. The death of a surety upon a supersedeas bond, upon which the surety was liable as a principal debtor, does not affect the right of the obligee to the summary judgment authorized by Rem. & Bal. Code, § 1739, upon affirmance, against both the appellant and his sureties or representatives, for the amount of the judgment.

ELECTION OF REMEDIES—SUPERSEDEAS BOND—ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING. The presentation of a contingent claim, pending appeal, against the estate of a surety upon a supersedeas bond on appeal and the commencement of an action thereon, does not constitute an election of remedies which would prevent

¹Reported in 154 Pac. 1107.

entry of summary judgment on the bond by the supreme court on affirmance of the judgment; since the supreme court first acquired jurisdiction by the appeal, and another action pending is not a good plea in bar of the primary action.

Motion filed in the supreme court November 30, 1915, for an order directing the substitution of the executor and executrix in lieu of a deceased surety on a supersedeas bond, and for the entry of a summary judgment on the bond against them and the principal thereon. Granted.

Vanderveer & Cummings, for appellant.

Arctander & Jacobsen, for respondent.

FULLERTON, J.—On January 23, 1914, Louis Olson recovered a judgment against the Seldovia Salmon Company, a corporation, for the sum of \$2,500, and costs of action taxed at \$83.40. The corporation appealed from the judgment, giving a supersedeas bond with one Julius Redelsheimer and one S. S. Loeb, as sureties. While the cause was pending in this court, Julius Redelsheimer died, leaving a nonintervention will in which he named his wife, Glorivina Redelsheimer, and Benjamin Moyses, respectively, as executrix and executor of his estate. On November 19, 1915, this court delivered its opinion directing that the judgment be affirmed. 88 Wash. 225, 152 Pac. 1033. Thereafter, and before judgment was entered in this court on the order of affirmance, the respondent Olson filed his affidavit suggesting the death of Redelsheimer, and moved in this court, on notice, for a summary judgment on the bond against the appellant, the surety Loeb, and Glorivina Redelsheimer and Benjamin Moyses, as executrix and executor respectively of the estate of Julius Redelsheimer, deceased. The motion is resisted by the executrix and executor on various grounds. These we will notice in their order.

If we have correctly gathered the first objection, it is that the right of action on the bond did not survive the death of Julius Redelsheimer, first, because of the joint nature of the

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obligation entered into; and, second, because his death was a revocation of his contract of suretyship operative as to any obligation arising subsequent thereto and that this obligation did so arise. It was the rule of the common law that, when a surety became jointly liable with his principal, the death of the surety ended the obligation as to both past and future defaults. This, however, was merely an application of the rule which prevailed at common law as to all joint obligations, and was abrogated by our statutes relating to the liability of joint obligors. Rem. & Bal. Code, §§ 193, 236, 967 (P. C. 81 §§ 35, 165, 1827). This question was before us in *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254. Noticing the objection, we said:

“It is next urged that when the surety dies and the principal survives, that the surety’s estate is absolutely discharged, and the survivor only is liable. But this is not so under our statutes (Code Proc., §§ 704, 1042), which provide that in certain cases, which would include this one, where actions could have been maintained against the party if living, that the same may be prosecuted against his representatives.”

To the same effect is *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032, where the following language was used:

“This case was before this court upon a former occasion (10 Wash. 339, 39 Pac. 131), to which reference can be had for a statement of the nature of the action. Pending the former appeal, Kirkman died, and it was stipulated in this court that the executors of his will might be substituted as defendants in his stead. When the second trial was begun the defendants moved to dismiss the action as against Kirkman’s executors on the ground that there is no survival of liability against the representatives of a deceased joint debtor. This point has been passed upon by this court contrary to appellants’ contention since his brief herein was filed. *Donnerberg v. Oppenheimer*, ante, p. 290 (46 Pac. 254).”

The rule invoked by the second part of the objection is limited to cases where the guarantor or surety might, if living,

have revoked his liability by giving notice, of which the obligation assumed in the present instance is not such. The governing principles are clearly stated by Circuit Judge Taft, in *Fewlass v. Keeshan*, 88 Fed. 573, in the following language:

"The first point made in this court by the appellants is that the cost bond does not bind the estate of the surety for any costs accruing after his death. The rule as to the obligation of a guarantor in respect to transactions occurring after his death is that the obligation is not affected by his death if the contract of guaranty was one from which he might not withdraw upon notice, but that, if he could have done so, then his death will be given the effect of a notice of withdrawal, at least from the time when the knowledge of the same has been brought home to the obligee. The former proposition is sustained by the cases of *Lloyd v. Harper*, 16 Ch. Div. 290; *Calvert v. Gordon*, 3 Man. & R. 124; *Green v. Young*, 8 Me. 14; *Moore v. Wallis*, 18 Ala. 458, and *Voris v. State*, 47 Ind. 345. The alternative proposition is illustrated in the cases of *Jordan v. Dobbins*, 122 Mass. 168; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765; *Coulthart v. Clementson*, 5 Q. B. Div. 42, and *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025. A court cannot release a surety upon a cost bond without the consent of the party for whose benefit the security has been given. *Holder v. Jones*, 29 N. C. 191; *Standard Publishing Co. v. Bartlett*, 5 Wkly. Law Bul. 501. This feature of the obligation of a cost bond places it in the category of irrevocable guaranties, the obligations of which continue according to their terms, without regard to the death of the guarantor."

To the same effect is the case of *Estate of Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427, where it is said:

"All voluntary bonds executed for a lawful purpose, like statutory bonds, derive whatever efficacy or binding force they have, from the positive law of the state, and in this respect there is no difference in the two classes of bonds. To hold that the estate of a surety on an ordinary trustee's bond is absolutely discharged from all future liability upon the death of the surety, on the ground that his death is *per se* an extinguishment of the bond, would certainly be a startling

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proposition to come from this or any other court of final resort; and yet to decide this case in conformity with appellant's theory would be, in legal effect, to assert, as we understand it, that very proposition. We unhesitatingly decline, both upon reason and authority, to give our adhesion to any such a doctrine."

A further objection is that the judgment creditor must exhaust his remedies against the principal debtor and the living surety before he can proceed against the representative of the estate of the deceased surety; and that, in any event, a summary judgment cannot be entered against such representatives in this court, but they must be proceeded against by an action on the bond in a court of the first instance. But it is clear that, if the decedent's estate is liable at all upon the bond, it is liable in the first instance as a principal obligor; the rule being that, as between the obligors and the obligee, all of the obligors are principal debtors, though as between themselves they may have the rights and remedies resulting from the relation of principal and surety. *Babbitt v. Finn*, 101 U. S. 7. See, also, our own case of *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641. Since, therefore, the estate of a deceased surety is liable to the obligee as a principal debtor, its representatives cannot claim as against him the remedies which might be applicable between the estate and its immediate principal.

Nor do we think the objection against a summary judgment well taken. The statute (Rem. & Bal. Code, § 1739; P. C. 81 § 1231) provides that, upon the affirmance of a judgment on appeal for the payment of money, the supreme court shall render judgment against both the appellant and his sureties on the appeal bond for the amount of the judgment appealed from, in case the bond is conditioned so as to support such a judgment, and for damages and costs on the appeal. The judgment below was a judgment for the payment of money. The bond was in the language of the statute relating to supersedeas bonds. It is, therefore, conditioned

to support a judgment in this court against the sureties, and, unless the fact of the death of the surety changes the rule of the statute, there is a clear right to enter judgment on the bond against the representatives of the deceased surety. For the reason that the estate is a principal debtor, we are constrained to hold that the fact does not change the rule, and that the respondent has the right to such a judgment.

On the death of Redelsheimer, the respondent presented to the representatives of his estate a contingent claim based upon his liability on the supersedeas bond, and, on the claim being rejected, brought an action thereon in the superior court. It is objected that this is in the nature of an election of remedies and bars the respondent from insisting on a judgment in this court against the representatives of the deceased surety. But we think the objection not well taken. The appeal vested this court with jurisdiction to direct the character of the judgment to be entered in the action, and the respondent has the right to pursue his action here to its final termination. Under the rule that a person may not pursue two remedies for the same wrong, it might be a defense to the action in the other court that an action for the same recovery was pending here, but the converse of the rule would not be true. Another action pending is a plea to a second action for the same cause of action, but is not a plea to the primary action. 1 C. J. 57; *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 Pac. 281.

The motion of the respondent is granted.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 12712. Department Two. February 9, 1916.]

FRANCIS M. VAN HORN, *Appellant*, v. CLARENCE CHAMBERS
et al., Respondents.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—EVIDENCE—SUFFICIENCY. It is error to deny a rescission of a contract for the exchange of properties, sought by plaintiff upon the ground of misrepresentations as to the character and value of land in Montana, which was subject to claims exceeding its value and therefore worthless, and for which plaintiff gave up property of very considerable value, where it appears that he relied upon false representations that the Montana land was high grade agricultural land with fine soil, capable of producing any kind of grain and particularly adapted to the growth of vegetables for which purposes it was desired, when in fact it was worthless for growing cereals or vegetables of any kind; the contract having been made in this state, several hundred miles from the land, which plaintiff had never seen, although he had been warned by an attorney to first investigate it.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered December 9, 1914, in favor of the defendants, in an action for rescission, tried to the court. Reversed.

Zent, Powell & Redfield and *Reynolds & Bond*, for appellant.

Sharpstein & Sharpstein and *Merritt, Oswald & Merritt*, (C. C. Lantry, of counsel), for respondents.

FULLERTON, J.—On May 8, 1913, the appellant, Van Horn, was the owner of a certain tract of land situated in Walla Walla county, in this state, containing some two hundred acres. Theretofore he had contracted to sell the land to one C. D. Weaver, under some form of deferred payment plan, on which there was, at the date named, a balance unpaid of \$10,500. Van Horn had listed his interests in the property for sale with a real estate broker residing in Spokane. This broker introduced him to the respondent Clar-

¹Reported in 154 Pac. 1084.

ence Chambers, who proposed to exchange for his interests a certain eighty-acre tract of land situated near Great Falls, in the state of Montana. After some negotiations between the parties, a written agreement was entered into between them by which Van Horn agreed to convey to Chambers the Walla Walla county lands and assign to him his interest in the contract, in consideration of a conveyance by Chambers of the lands in the state of Montana, the payment of \$530 in cash, and the assumption by Chambers of an obligation of \$180 due from Van Horn to one A. J. Bolter; the exchange to be consummated as soon as abstracts of title to the lands could be furnished and deeds executed. Deeds were executed and delivered on May 10, 1913, two days after the agreement was executed, but prior to the time the abstracts were furnished. The deed executed by the appellant ran to the respondent W. H. Honefenger, instead of the respondent Chambers who furnished the consideration for the exchange.

Shortly after the execution of the deeds, the appellant visited the property in Montana, and finding it, as he contended, not in accordance with the representations made by Chambers, returned and sought a voluntary rescission of the contract. This being denied him, he instituted the present action to enforce a rescission. The trial court denied him relief, and from the adverse judgment, he appeals.

On the question whether the appellant was actually defrauded, the evidence leaves no room for doubt. For the very considerable values he gave in exchange, he actually received only the value of the cash payment made to him by Chambers. The land in the state of Montana was first sold on execution shortly after the exchange was made, under a judgment obtained against Chambers upon an obligation he had left unpaid, to a resident of that state, and subsequently upon the foreclosure of a mortgage outstanding against the property at the time of the exchange. These sales exhausted the property, leaving no surplus to the holder of the fee.

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Nor does the evidence leave any doubt that Chambers misrepresented the character and value of the lands. He represented them as worth \$125 per acre, and that a loan could be readily obtained upon them for \$2,500; that it was high grade agricultural land with a fine soil, capable of producing any kind of grain, and was particularly adapted to the growth of vegetables, the purposes for which the appellant desired it. The sequel proved that all of these representations were untrue. No witness valued the land at anywhere near the value put upon it by Chambers, and the appellant testified that the best offer for a loan upon it was \$5 per acre. It is practically undisputed that the land is worthless for growing cereals or vegetables or for any kind of agriculture, and that it had never been used for such purposes. It was shown also that Chambers misrepresented the amounts of the mortgage upon the property, and that he said nothing concerning liens or the possibilities of liens from unsecured indebtedness.

The principal question is whether the appellant acted, in making the exchange, with that degree of prudence required of him under the circumstances. The respondent's counsel argue with much earnestness that he did not, citing and relying upon the case of *Washington Central Improvement Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366. But that case was rested chiefly upon the ground that misrepresentations alleged to have been made related to matters easily ascertainable by the person claiming to have been deceived; that they were representations the truth or falsity of which the injured party could have ascertained by only ordinary diligence, and that his failure to exercise such diligence was negligence on his part. In the course of the opinion, it was recognized that a different rule obtains where the opportunity to investigate is not at hand, such as where the property is at a distance, or where for any reason the truth or falsity of the representation is not readily ascertainable. This dis-

tion is recognized also in our later cases, notably in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65, and *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585. In each of these cases it is held that a "purchaser may rely upon the representations of a vendor where the property is at a distance, or where for any other reason the falsity of the representations is not readily ascertainable." The facts of the case at bar bring it within the rule of the later cases rather than the earlier one. The contract for the exchange of the property was made at Spokane, in this state. The land in Montana was several hundred miles distant. It was known that the appellant had never seen it, but was relying upon the statements concerning it made by Chambers. Chambers, therefore, spoke at his peril. He should have told the truth or remained silent.

The respondents also rely much upon the fact that warning was given the appellant not to make the exchange without first examining the land he was to receive. This warning came through an attorney with whom the appellant consulted with reference to a minor matter concerning the exchange. But the fact that the appellant did not heed the warning cannot, it seems to us, aid the respondents. To us it only evidences the fact that he had been completely deceived by the respondents; he was led to believe that he was in the hands of Samaritans, whereas he had fallen among the Philistines.

The judgment is reversed, and the cause remanded with instructions to direct a reconveyance from the respondent Honefenger to the appellant of the lands in Walla Walla county, together with a reassignment of the contract mentioned, on the appellant's paying into court for the respondents the sum of \$530, and depositing therein a reconveyance to Chambers of the land in Montana. As a condition precedent to a reconveyance, the appellant must also pay into

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court the obligation assumed by Chambers, should it be established that Chambers has complied with his agreement by paying the debt.

MORRIS, C. J., MAIN, and ELLIS, JJ., concur.

[No. 12828. Department One. February 9, 1916.]

F. W. HAVERLAND, *Plaintiff and Appellant*, v.
THADDEUS S. LANE *et al.*, *Defendants*
and Appellants.¹

FRAUD—PURCHASE OF STOCK—DECEIT AS TO BUYER. In an action for fraud in the sale of corporate stock, concealment of the fact that the stock was bought for the account of an undisclosed buyer is immaterial, where that fact made no difference to the sellers, who were concerned only in getting a satisfactory price.

SAME—PURCHASE OF STOCK—DECEIT AS TO RECEIVERSHIP. Fraud in the purchase of corporate stock cannot be predicated upon the representations that, unless the stock was sold to defendant, the company would be put in the hands of a receiver, where it appears that the company was insolvent or about to become so, and subject to a receivership unless the stock was secured by those who could lend it a new credit.

CORPORATIONS—SALE OF STOCK—TO OFFICER—FRAUD—DUTY OF PURCHASER—DISCLOSURE OF MARKET. Upon the purchase of corporate stock by another stockholder who was an officer in the company, the latter is not bound to disclose his market or reveal a contract that was the result of a personal venture, if the sale was not for the benefit of the corporation.

SAME—PURCHASE OF STOCK—FRAUD—EVIDENCE—SUFFICIENCY. In such a case, damages for the misrepresentations cannot be claimed by sellers of the stock who had opportunity to investigate the books of the company and received their own price, which was about its actual value and in advance of the market price, if it had a market value, and the parties dealt at arm's length.

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered January 9, 1915, upon

¹Reported in 154 Pac. 1118.

the verdict of a jury rendered in favor of the plaintiffs, in an action for fraud. Reversed on defendant's appeal.

Danson, Williams & Danson (George D. Lantz, of counsel), for plaintiff.

Post, Avery & Higgins, for defendants.

CHADWICK, J.—The plaintiff and his assignors, whom we shall hereafter refer to as the plaintiffs, were stockholders in a telephone company having lines in northern Idaho and running into Spokane, Washington. We shall call it the Limited Company.

The defendant T. S. Lane, whom we shall hereafter refer to as the defendant, was interested as an officer and stockholder in several independent telephone companies in the state of Montana, and in the Home Telephone Company in the city of Spokane, Washington. These were known locally as the "Independents."

In order to secure a line into the city of Spokane, the Independents negotiated for the purchase of the Limited Company. At the time, there was a certain holding company organized under the laws of the state of Montana, known as the Interstate Consolidated Telephone Company. We shall call it the Consolidated Company. This company held the stock of all the independent companies. After negotiating for some time, the Limited Company was sold to the Consolidated Company. In consideration of the transfer of the stock of the Limited Company, the Consolidated Company issued shares in the Consolidated Company to plaintiffs at the rate of one and one-half to one. As a matter of special inducement to those in authority, plaintiff, Haverland, was given a bonus amounting to 550 shares of a par value of \$55,000.

The Limited Company was transferred to the Consolidated Company in 1910. In 1911, the independent companies were not prospering. Not more than one or two of them were paying expenses or interest upon their bonds. There were no

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earnings for distribution or to pay dividends on the stock. In the fall of 1911, the Consolidated Company had outstanding obligations amounting to approximately \$1,200,000. It is likely that its assets, liberally considered, did not exceed \$400,000. However that may be, there can be no doubt that, in the fall of 1911, the Consolidated Company was in a state of no more than tolerant solvency. It was borrowing money to meet expenses and interest charges. Its stock had no tangible or market value. It may have had some speculative value, but there was not even a hope of a fixed fair value on the market.

At this time defendant and another by the name of MacGinniss, who was interested in the independent telephone companies in the state of Montana, went to New York and sought to finance the Consolidated Company. They secured a loan which met temporary needs, but it was apparent that the relief was at best for a short time only, and some further relief would have to be found. Returning from New York, defendant and MacGinniss went to Denver, where they undertook to interest other parties. Nothing definite was decided at the time. In February, 1912, they returned to Denver and the matter was again taken up with Mr. Smith, who was general counsel for the Mountain States Telephone Company, Mr. Hamlin, assistant to the president, and Mr. Field, first vice president of the same company and its active manager. Credit to the Consolidated Company was refused, but it was agreed that a company to be known as the Corporation Securities and Investment Company should be created. It was organized by Mr. Smith through the instrumentality of clerks and employees in his office. We shall refer to it as the Securities Company. After some further negotiations, the Securities Company made and delivered to MacGinniss a writing, wherein it agreed to take 17,555 shares, which would carry a control of the company, at \$80 per share, and it was further agreed that MacGinniss would undertake to deliver within ninety days 6,143 shares of the stock, for which the

Securities Company agreed to pay seventy per cent of its par value. The 17,555 shares were delivered promptly. Some of the stock was held in the city of Spokane, the plaintiffs being residents of that city.

The book value of the Consolidated stock at the time, and for a long time thereafter, and possibly at the present time, so far as the record shows, was about \$13 a share. It was occasionally sold on the market in Spokane through the brokers who were members of the stock exchange, an institution which has been maintained for many years, for prices ranging from \$12 to \$20.

Defendant, who was president of the Consolidated Company, caused a letter to be written to plaintiffs on the 16th day of August, 1912, demanding that they return to the Consolidated Company certain stock and preferred certificates which they had caused to be issued to themselves when in control of the Limited Company and which seem to have been issued without any consideration moving to the company. Plaintiff and Phelps referred the matter to Mr. Williams, one of the plaintiffs' assignors, who had a slight holding of stock and who had been their counsel in another matter, and it was his judgment, as well as their own, that defendant had caused the letter to be written in order to coerce a sale of their consolidated stock. Defendant disclaims this motive, but however that may be, the fact is that, through the instrumentality of these letters, the parties were brought in personal contact. They could not agree on the price for the stock, defendant insisting that it was worth \$20, which was the prevailing price among brokers, and plaintiffs insisting that it ought to be worth more money. It was finally agreed that defendant would pay, not for the stock but as a bonus, enough to make a net return of \$25 per share. Mr. Williams, by demurring longer than the rest, received \$31 per share. Defendant claims to have paid this price, as he paid \$70 for certain stock held by the officers of the Fidelity National Bank, for the reason that it was his intention to make every

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stockholder whole, that is, to pay them all that they had put into the stock. Plaintiffs knew, or had heard enough to lead them to the information, that the Fidelity people had received \$70 for their stock. The stock was indorsed in blank and sent with a draft attached for the purchase price to MacGinniss at Butte, Montana, who paid the drafts and cancelled the stock.

In some suit brought in 1914 by the government against the Bell Telephone Company, of which the Mountain States Company and the Securities Company were subsidiary, it was developed that the stock which defendant had purchased had been turned over to the Securities Company by MacGinniss at \$70 and \$80 a share. This being published in the newspaper report of the proceedings, Mr. Phelps and Mr. Williams assigned their right of action to Mr. Haverland, who began this suit to recover from the defendant the difference between the price paid to them and the price which the Securities Company paid to MacGinniss for the stock. They claimed, first, that, although the stock had no tangible or market value above \$20 a share, or no book value beyond \$12 or \$13 a share, there was a value, in virtue of the contract, of \$80 a share; and second, because of defendant's relation to the Consolidated Company and to its stockholders, he was under a legal duty to disclose the fact that he was selling the stock at \$80 per share to the parties in interest that they might participate in the sale to the Securities Company. They allege active fraud and deceit in that they had no present intention of selling, that they were not under the necessity of selling, and that they would not have sold but for certain representations which were false—that is, that the Consolidated Company was in a state of insolvency and that, if the sale was not made, the company would be put in the hands of a receiver; and that defendant wrongfully concealed and denied the fact that his purchase was made in the interest of the Bell Telephone System. The case was tried by the court with a jury. At the close of the plaintiffs' case,

defendant interposed a motion for a directed verdict. The motion being denied, was renewed when all the evidence was in, and again being denied, was later renewed by way of a motion *non obstante veredicto*. The court, in passing upon the motion, held as follows:

"As I read the complaint, there are four separate allegations of fraud. The first is that with respect to the book value of the stock being \$13 a share. I think that this is immaterial, but if it is not immaterial, the plaintiffs had no right to rely upon the representations for the reason that they had an opportunity to examine the books and did examine certain of the books, and if they failed to examine those books which would show what the book value was, it is their own fault that they were misled. The second is with respect to the insolvency of the Interstate Consolidated. I think that these representations are immaterial so far as they concern those persons to whom the indebtedness was due, but I think that there is a question of fact as to whether or not the corporation was in fact insolvent on the 30th day of September, 1912, and I think it is also a question of fact, as to whether or not there was any danger of a receivership at that time, and the representations in this respect are, I think, a question for the jury. The third representation is that the Bell interests were not concerned in the deal, had no interest in buying up the stock. I think that this is a material representation and if relied upon by the plaintiffs, the question is for the jury to say what their damage is by reason of their misrepresentation. And, fourth, the representation as to the defendant Lane not being interested in the deal. I think that this is immaterial, but as to representations two and three I think they should be submitted to the jury upon proper instructions. I will say, though, gentlemen, that with respect to the representation about the Bell interests not being interested, that it seems to me it is clear that the plaintiff Haverland did not rely upon that, and there is some doubt in my mind as to whether Phelps did or not. So far as Haverland is concerned, it seems to me that his testimony is clear that he did not rely upon it, that the matter that induced him to sell was the representation with respect to the immediate danger of a receivership."

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The jury returned a verdict for a part of the amounts claimed by plaintiffs. Both sides have appealed.

After a patient examination of the record, we think that the holding of the court, in so far as it goes to the facts of the case, is well sustained, with the exception of his holding that there was a question of fact as to whether or not the company was insolvent on the 30th day of September, 1912, that being the day upon which the plaintiff sold his stock. We find no testimony that would warrant a holding that the financial situation of the Consolidated Company was any better on September 30th, 1912, than it was in the preceding year, for it will be remembered that the amount paid by the Securities Company was paid to MacGinniss and did not become a part of the assets or available funds of the Consolidated Company.

Whether there was any issue to submit to the jury as to other questions discussed by the court is a matter of law rather than of fact. They depend upon the legal propositions submitted by the plaintiffs—that is, whether there was a value to the stock which plaintiff was entitled to receive, and whether defendant bore a fiduciary relation to the plaintiff and was bound to disclose the fact that the Securities Company had been organized and had entered into the contract for the purpose of bringing the property into the Bell system, and further, whether, these things being true, a concealment of these facts was such a fraud as to warrant a recovery for the amount claimed.

The parties cite a number of cases. We shall refer to a few of them, but it can hardly be said that any one of them is directly in point. Cases sounding in fraud are valueless except in so far as they hold to an established principle, for there, more frequently than in any other branch of the law, do we find the facts to vary. No two cases have the same setting.

We shall spend no time in discussing the contention that the concealment of the fact that the stock was bought for

the interest, if not for the account of, the Bell company was a deceit warranting a recovery. One of the plaintiffs admits that it made no difference to him who the actual buyer was, and the others so testify that the only fair inference to be drawn from the testimony is that they, too, had no interest in the purchaser. Their only concern was to get a satisfactory price. To overturn a consummated sale because a vendor sold indirectly at his own price to one to whom he would not have sold directly would be to hang the law upon a thread so slender that it would not bear its own weight. Whether it was the duty of defendant to admit the existence and the nature of the contract with the Securities Company will be discussed later.

Whether the representation that, unless defendant secured the outstanding stock in the Consolidated Company, it would be put in the hands of a receiver is such a deceit as the law will call a fraud and permit a recovery of damage, is a more material question. Its solution depends upon an inquiry as to the relations of the parties, one to the other, and the financial situation of the company.

We cannot understand how a sale of stock by plaintiffs to defendant would have any bearing upon the question of a receivership. A sale of stock by one stockholder to another cannot affect the financial standing of the company in any degree. It is a transaction that was purely personal to the parties. Plaintiff had the advice of a skilled lawyer who had a personal interest in the transaction. Undoubtedly the company was subject to a receivership, for it was in an insolvent condition. There was no deception in the representation that the company would be thrown or have to go into a receivership unless the stock was secured by others who were financially able to lend it a new credit or to reorganize it with a new capital. A similar statement was relied on as a basis of fraud and coercion in *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879. Of it Judge Ross said:

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"If there was fraud or coercion, it consisted in that one act [closing down a mine], emphasized by the statement of Steinfeld to Nielsen that, if he did not take the offer of Steinfeld, he would get nothing for his stock. This last statement, construed under the condition in which it was made, was not necessarily a threat, for it was a fact that the corporation was largely indebted and liable to be sued and its assets taken by creditors; and it was without means to meet the payments on its optional contract to purchase the mines, and a failure to make such payments subjected its principal asset—the mines—to be forfeited as well, also, as all previous payments."

Chief Justice Franklin, in his concurring opinion, held:

"From a fair consideration of the evidence, I am unable but to conclude that the only means whereby the stock would become of any value was by a sale of the mines of the corporation consolidated with the adjoining mines acquired by Steinfeld with his own funds."

In that case there had been an actual enhancement of the value of the stock. The authorities are collected in the *Steinfeld* case, *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636, being especially instructive.

Plaintiffs knew, or should have known, that no one would purchase unless his object was to prevent a receivership, and apparently resting under such knowledge, were content to turn their backs upon the company for two years or more. They are also bound to a knowledge that the object of the sale as disclosed to them had been accomplished. Furthermore, they knew, or had the means of ascertaining, the financial condition of the Consolidated Company. They had access to its books, and actually made an examination to the extent desired without let or hindrance. They asked for nothing that they did not receive. They knew that company had not paid dividends and that there was no prospect of a dividend, and they knew if the company kept on borrowing money to meet expenses and interest it would inevitably result in a receivership. They sold knowing that the object of the de-

fendant was to prevent a receivership, and they cannot now complain that his statement was deceitful because there was no receivership. This is so for the very simple reason that the law charges them with a knowledge that a sale by one stockholder to another would not of itself create any new source of credit, increase the assets, or invite the intervention of a surety; and that the most probable consequence of gathering in the stock of an insolvent corporation would be to put it in the control of those who might be willing to finance it or to reorganize it if they were in control of it.

But it is said there was no danger of a receivership. To so hold we would have to say that the effect of the MacGinniss contract was to make the company solvent. Just how it can be so held is not made clear by counsel. The parties who bought the stock paid above the market, but that was their own concern. The sale to the Securities Company did not add a dollar to the assets of the Consolidated Company. A purchase of stock at a fancy price for the purpose of gaining control of a corporation will not fix a market price. 2 Cook, Corporations (7th ed.), § 581.

Neither does the testimony show that such market price as the stock of the Consolidated Company had was in any way enhanced. There is nothing to show that it became suddenly more valuable. Indeed, so far as the record shows, there was nothing to excite the interest of the plaintiffs until the sale of the stock to the Securities Company was disclosed in the government suit. It would seem, therefore, upon principle, that the representation that the company would be put into the hands of a receiver unless plaintiffs sold their stock would not be actionable unless it involved an actual misrepresentation as to the value of the stock, or possibly a showing that the stock became more valuable because of existing facts which the vendee, being an officer of the company, was bound to disclose. In any event, if plaintiffs' theory be sound, they, having knowledge that the Consolidated Company did not go into the hands of a receiver, should have

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been diligent in the assertion of their rights. We do not comprehend why they should sell their stock under a representation that it would prevent a receivership and afterwards insist that the representation was deceitful, relying upon the fact that the very thing that was in the minds of the parties came about.

Passing these questions, it remains only to inquire: (1) Whether there was a market to which plaintiffs were entitled; and (2) if so, was it the duty of defendant to disclose it, either (a) because he was an officer of the Consolidated Company, or (b) because it was his duty to disclose the market and the terms of his contract when asked if the sale was for the benefit of the Bell Company.

These several questions may be best discussed in a general way. It must be borne in mind that the transaction was a sale of stock from one stockholder to another, the purchaser being an officer of the company. Was there a legal duty upon the defendant to disclose his market? The duty of a stockholder, he being an officer, when purchasing stock from another stockholder, has been defined by this court in *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692. The court adopted the text of 21 Am. & Eng. Ency. Law (2d ed.), p. 898:

"The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position."

This is the holding of all the courts. Cook, Corporations (7th ed.), § 320; Beach, Corporations, §§ 246, 614.

It would seem, then, if we grant that defendant was bound to disclose anything that might affect the corporation, that he was under no duty to reveal a contract and a market that was the result of a personal venture. There is nothing in the law that will prevent a stockholder, although he be an officer, from dealing in the shares of a corporation. He may find a

market and buy stock to fill it. If his purchaser is willing to pay more than the stock is worth to get control of the company, or for any ulterior purpose, it is of no concern to the seller.

If the purchaser is under personal contract to deliver to a third party, he is not bound to disclose his market. If it is for the benefit of the corporation, he is. In this distinction is to be found the dividing line between actionable and nonactionable fraud and deceit. In all of the cases relied on by counsel will be found a duty, whether it rest in agency, partnership or joint venture. The parties were not dealing at arm's length, but the one was bound to act for the other, or for all having a like interest. The only case to which we shall refer is *Strong v. Repide*, 213 U. S. 419. It is said by counsel to be parallel in facts and conclusive of this case, but we do not so regard it.

In that case, there was an inactive corporation. It was no more than a name. It owned large bodies of land. "The company had no other property of any substantial value than these lands. They were its one valuable asset." We take it from the report of the case that the lands were not kept up in any way by the owners, but were held pending a possible purchase by the United States government. There was nothing left of the corporation when the sale was concluded. The parties were, to all intents and purposes, partners with interests proportionate to their holdings of stock. The principal owner, because of his large controlling interest, had been consulted and knew that the lands might be sold for a price to be agreed upon; that a large sum of money had already been offered by the government. He did not go to the complaining stockholder or to her agent, although he knew him. He had an office in the same building. He purchased the stock through the intervention of a relative, who in turn employed a broker to approach the agent who had the stock in his hands. Every effort was made to conceal the prospective sale of the lands, and the immediate purchaser of the stock.

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"Perfect silence was kept." Suspicion was anticipated and avoided. "The agent of the plaintiff had no knowledge or suspicion that the defendant was the one seeking to purchase the shares." The value of the stock, by reason of the sale of the lands, increased from \$16,000 to \$76,256 in two months and a half.

In the case at bar, the sale was entirely independent of the corporation. It did not involve its tangible assets in any way or affect their value. The parties dealt face to face. Plaintiffs knew that defendant had been purchasing stock and wanted theirs. They were suspicious of him and voiced their suspicions. They had access to the books of the company. They knew that the company was subject to a receivership if it passed its interest payments. They no doubt entertained a natural belief that others were seeking the property for their own advantage and benefit. Taking their suspicions at their full worth, they amounted to no more than this: they were apprehensive that the sale was for the benefit of some one with means to rejuvenate the Consolidated Company. But that was not enough to defeat a sale if they got a fair price. They accordingly capitalized their suspicions in money and took \$5 per share—in one instance \$11—above the price at which it was selling among the brokers in Spokane. Then, too, this case is to be distinguished from the *Strong* case, in that the record shows no marked increase in the market value of the stock.

In discussing the *Strong* case, it is not out of place to refer to one of the contentions made by plaintiffs; that is, if they had been informed of the contract with the Securities Company they might have sold to that company. We do not so read the record. It is true that Smith said they were willing to take the stock from any one who had it, but he also said that they would not have purchased it from any one except through MacGinniss. It is evident to us that this must be true, for the whole negotiations between the Securities Company and MacGinniss and the defendant were kept secret

until they were disclosed in the government suit. At that time the transactions between the parties had ended. The Consolidated Company and its affairs had not attracted the attention of plaintiffs or any one until they learned through the newspapers that, although they sold their stock at above its actual worth, granting that it had a market value, they had not been privileged to share in the exploitation of the Bell Company by its own agents and officers of its subsidiary, the Mountain States Telephone Company.

In the case at bar, the defendant was not an agent but a buyer. He bought on the market at the seller's price. The parties dealt at arm's length. The law will presume that defendant bought for an advantage, and under the authority of our own decision in *O'Neile v. Ternes, supra*, he was not bound to disclose his market and is consequently entitled to the advantage of his trade. If MacGinniss had not delivered under the contract, or the Bell Company had compelled a restitution from its agents, the loss would have fallen upon him and him alone. It is insisted that there is no testimony to sustain a finding that defendant profited by the deal. We think there is no direct evidence of this fact.

Plaintiffs, as stockholders, have lost nothing that the law will compensate in damages. They have no cause of action. The only party legally injured, in so far as the record goes, is the Bell Telephone Company, which seems to have suffered by reason of the activities of its agents and servants in their own behalf and at its expense. It is not now complaining.

Reversed on the appeal of defendant, and remanded with directions to dismiss.

MORRIS, C. J., FULLERTON, ELLIS, and MOUNT, JJ., concur.

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Statement of Case.

[No. 12920. Department Two. February 9, 1916.]

ANNA DAVIES, *Respondent*, v. MARYLAND CASUALTY
COMPANY, *Appellant*.¹

INSURANCE—INDEMNITY INSURANCE—PAYMENT OF JUDGMENT. The execution of notes by an insolvent coal company in satisfaction of a judgment recovered by the widow of an employee, is a mere subterfuge and not a payment of the judgment, where the company was indemnified by a policy of indemnity insurance, which it at the same time assigned to the judgment creditor in consideration of the immediate cancellation and return of the notes, the intention being to enable the creditor to sue on the policy as though the assured had in fact paid the judgment.

SAME—INDEMNITY INSURANCE—PREPAYMENT OF JUDGMENT—WAIVER. Where an insurer on an indemnity policy undertook the defense of an action against the employer, it assumed a feature of a liability contract as distinguished from an indemnity contract, and waived the right to insist that the assured pay the judgment before action on the policy.

CORPORATIONS — CONTRACTS — AFTER FORFEITURE AND RECEIVERSHIP—VOID OR VOIDABLE. Where an insolvent coal company, after its name had been stricken for failure to pay its license fees and its assets had thereupon passed to a receiver, assigned to its judgment creditor an indemnity policy indemnifying it on account of the judgment, in exchange for an attempted satisfaction of the judgment, in order to permit the creditor to sue on the policy, as though the judgment had in fact been paid, the assignment was not void but voidable, the receiver having acquiesced therein, and the indemnity company cannot set up the invalidity of the assignment.

APPEAL—REVIEW—HARMLESS ERROR. Reversible error cannot be predicated on misconduct of counsel where it is clear that the verdict of the jury could not possibly have been affected thereby and the verdict should have been directed as rendered.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 18, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon an employer's liability policy. Affirmed.

John W. Roberts and *Geo. L. Spirk*, for appellant.

Brady & Rummens, for respondent.

¹Reported in 154 Pac. 1116; 155 Pac. 1035.

BAUSMAN, J.—Plaintiff's husband was killed in a mine of the Rose-Marshall Coal Company when that company had a policy of indemnity from the casualty company. After prolonged litigation, including an appeal to this court (*Davies v. Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180), judgments for \$15,000 were obtained by the widow and her son in consolidated actions against the coal company. The present suit against the casualty company alone was brought by the widow as the coal company's assignee of the policy. Judgment being given against the casualty company for \$5,000, its full amount, the casualty company appeals.

In addition to alleged trial errors, which will be discussed later, the appellant contends that the coal company had never paid the loss and thus put itself in a position where, by the policy, it could ask reimbursement; second, that there was nothing assignable in this policy before that; third, that the assignment was not only without consideration, but in bad faith.

The coal company was incorporated in 1910, the policy issued in September of that year, and the death of Davies occurred in December following. That the coal company is utterly insolvent is clear. The Davies judgment was first recovered in June, 1912, and, after the appeal here, was made final below in November, 1913. A receiver of the coal company, appointed in March, 1914, before the present action but after the assignment of the policy, found no assets. The only other asset the company had, between the date of the Davies judgment and the commencement of this action, was a leasehold interest in coal lands, forfeited at some uncertain date after the accident. The policy we shall construe as intended to reimburse, and not to prepay, the assured. It resembles the generality of these contracts, but does lack some features that are common in them. Thus, the insurer, while engaging to defend suits, did not in terms exclude the assured itself from defending. Neither did it forbid an as-

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signment of the policy. It permitted cancellation by the insurer at any time on five days' notice, with partial refund of premium. The suit of Davies against the coal company was defended from the beginning by the insurer, with whom there is no evidence that the coal company in any way interfered.

Plaintiff admits that the policy is one solely of reimbursement, and that nobody could sue the insurer until the employer had paid the judgment; but the employer, she argues, had in fact paid the judgment, after which it assigned to her the then actionable policy for a valuable consideration.

The facts are that the insolvent coal company executed notes of \$17,000 to Mrs. Davies, that she, on the same day, gave them all back, satisfied the judgment, and took a written assignment of the policy. In our opinion, this transaction was but a subterfuge. We have, of course, held in *Seattle & S. F. R. & Nav. Co. v. Maryland Casualty Co.*, 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121, that an employer may make by notes such a payment to a creditor employee as will sustain a suit for reimbursement from one of these insurers before the notes are paid. In that case, though, the assured employer was not insolvent. When it gave notes, it gave something valuable. Here, insolvency made the notes presumptively worthless. But other facts here are still stronger. The notes were hardly issued until they were handed back. Not only were they given back immediately, but they were actually issued with an ill-concealed understanding that this should be done immediately. The maker practically never took its hands off them. It never expected to pay them. The payee's own testimony leaves it clear that she expected to return them immediately, satisfy the judgment, and get the policy. Moreover, what she gave back was not \$5,000 of these notes, but all of them. She satisfied a judgment for \$17,000 in exchange for a right to sue the casualty company in not to exceed \$5,000; all this in a few hours. The transaction cannot be sustained as a payment by the coal company.

If, then, plaintiff's right to sue the casualty company were to depend on plaintiff's own theory, her case must fail. But other facts require our consideration, and we must enter on a discussion beyond, to be sure, the scope of the briefs on either side, but indispensable to justice in this case as well as to a proper view of these contracts in the future.

The Davies claim against the coal company was long resisted by the casualty company. To reimburse for such a claim, when established by judgment and paid, was the purpose of its contract. The judgment has established that claim. Nothing remains except a form. The casualty company in effect says to Mrs. Davies that, if the coal company will pay her at one end of the desk, the casualty company will repay the coal company at the other end. Not one thing besides, does it argue, is wanting to its liability except this formula. On that process it insists, not because when the coal company shall have first paid and the casualty company shall then have given reimbursement there will result to it a right, claim, or even a salvage interest against the coal company or its assets, but because it wishes the thing done in just that way. It will pay a moment after, not a moment before, the coal company pays. If the latter will but get a loan for a few moments from some one else and pay the judgment, then the casualty company will hand it a check, perhaps long previously prepared.

Such mummeries are ill-favored by the law. Technicality, indeed, is not only respectable, but is to be enforced by courts when even a remote right is exposed to danger. When technicality is invoked, however, to avoid an obligation morally established, the common law usually finds in its arsenal some weapon with which to confront it and to make that a legal which is already a moral debt. The actuary of the casualty company undoubtedly reckoned on paying a loss thus earned. It must be assumed that reserves are not calculated upon an escape through the chance of the assured's insolvency after liability to the employee. It is the executive branch of the

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insurer that, looking to the precise words of contract, may feel itself justified in adding casual gains from situations like these, where some claims will be perfectly established, be morally complete in every respect, but where the employer, not allowed by the insurer to pledge or assign the policy one minute in advance, will be unable to get so much as a temporary loan.

Employers' policies are of two sorts. One, called a liability contract, obliges the insurer to pay the loss without first requiring the assured to do so; the other type, of which the present is one, is called an indemnity policy, and imposes only reimbursement after the employer has paid the debt. This last being found better for the insurer, the liability policy has gradually been displaced by the other.

Tracing, now, the growth of the indemnity policy up to its present phraseology, its basic principle was that the assured would not only first pay the loss, but that he would attend to his own defense. The indemnifier, standing aloof, would pay the final bill, providing the defense had been honestly conducted by the employer. Generally speaking, the practice, as well as the contract of the indemnifier to take over the defense, came later. To do that under the old liability policy was natural, but under the pure indemnity policy was not natural. The insurer desired to defend through his own agent because he could do so more cheaply than the employer, who would charge the expenses to him, and because he could be more certain of the good faith of that defense. He, accordingly, wished to become a mere reimbursor in law while a defender in fact.

But in taking over the defense, the insurer assumes a feature of a liability contract as distinguished from an indemnifying contract. When an accident occurs, he hurries to protect the assured and himself from liability by defeating the claimant in advance. But when the claimant has been successful, the insurer, falling back on the other theory, argues that he is not a liability insurer, only a reimburse-

ment insurer. This shifting subjects him to the familiar doctrine of estoppel by election in inconsistent positions. The law does permit him to have the exemptions of a reimbursement engagement, but he cannot have the benefits of a liability engagement at the same time. If he wishes to rely upon the former, he may continue to do so under the words of his contract and leave the defense to the assured. When he takes over the defense himself, he will not be heard to say that he has not assumed the position of a liability insurer.

Accordingly, we hold that, by conducting the defense, the employer's insurer waived the right to exact prepayment by the assured, and that, on the final judgment of Davies against the coal company, "loss" matured. The policy, as one of reimbursement, could then be either sued on by the assured or be assigned.

Such a consequence of the insurer's acts would seem, aside from any justice to the employee, to be but fair to the employer also; for the latter, whose solvency and protection are supposed to be promoted by these policies is, as this feature is now taken advantage of, exposed to a willingness and even a desire in the insurer to see him not succeed but fail. In fact, they do sometimes fail because they are left unassisted by their insurer in just such a juncture, for the employee's judgment often ruins embarrassed employers, notwithstanding they hold in their hands the very contract that was supposed to save them. They are told by the maker of that contract that he will save them when they have saved themselves. If that is to remain permissible in these insurers, it will not remain such in this state when they take over the defense and costs of a suit. Such a privilege in their contracts involves a question of public policy. It is a privilege that would be grudgingly extended, if ever extended at all, to any private individual, since it increases the temptations to prolong litigation and puts in the hands of a stranger, who may gain by harshness, a controversy that ought to be left to those whose previous relations invite reconciliation and concord.

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This brings us to the assignment that was made. It is clear that, before this was done, the coal company's name had been stricken by the secretary of state from the public rolls for want of paying its annual licenses during the prescribed period. In consequence of this, the assets of the corporation passed to its trustees to be disposed of, as the statute expresses it, under the order of the court in appropriate proceedings. Just what proceedings would be appropriate are not specified by the statute. The receiver, appointed after the assignment of the policy, acquiesced in that transaction, of which he was plainly cognizant and in which he appeared to assist.

Whether the act of assigning the policy in exchange for a satisfaction of the judgment was *ultra vires* under our statutes which, though intended to be revenue measures must necessarily be enforced with some rigor to produce the desired revenue, is a question not necessary to be determined. The assignment, we are confident, was not void but voidable; and if it was voidable, it was not the casualty company that could complain of it. *Voltz v. National Bank*, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155. To the latter it should be unimportant which it pays when the loss is due; and the corporate acts that are in excess of corporate power and yet unassailable by third parties are too numerous to mention. Neither creditors, if any such exist (which the record does not show), nor the receiver have sought to disturb this transaction.

In view of the foregoing, the judgment of the lower court must be affirmed. Nor can we reverse it for misconduct of plaintiff's counsel, either as witnesses or as advocates before the jury. The misconduct complained of is, indeed, such as the lower court should have reprehended, for defendant's counsel made to this misconduct timely and proper objection. But no case can be reversed for misconduct of counsel when it is clear that the verdict of the jury could not possibly

have been affected by it. Such is the present instance. The jury had to bring in a verdict of the \$5,000 sued for or no verdict for plaintiff at all. Under the undisputed testimony in this case, plaintiff was in fact entitled to an instructed verdict in her favor for the amount of the policy. It is in that sum that the jury, though the case was tried by both parties under a mistaken theory, have given their verdict.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, and MAIN, JJ., concur.

PARKER, J., concurs in the result.

ON PETITION FOR REHEARING.

[Decided March 17, 1916.]

PER CURIAM.—In a petition for rehearing, counsel complains that we have not adverted to *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69. There the injured person, after judgment against the employer, sued the insurance company without assignment of the policy, arguing privity with the insurer on the theory that the contract was really for his benefit or had been made so by the insurer's conducting the defense. We denied that privity of contract there and have not, by any expression whatever, allowed it to Mrs. Davies here. The difference is that Mrs. Davies sues as assignee of the policy. We have simply made the policy an asset of the employer after defense by the insurer and judgment against the employer. To shake the soundness of our conclusions, the petitioner offers no argument, largely citing cases where, as in our *Aetna* case, the injured plaintiff sought unsuccessfully to establish privity. From our views on this subject, we see no evil results, but on the contrary, relief both to employers and to employees in a class of cases, small but of downright injustice, in which, when insolvency happens to the employer, the insurer escapes a liability actually earned by premium and covered by reserves.

While the *Aetna* case chiefly discussed privity, it closed with another feature in which our present decision is not

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consistent with it. The plaintiff there had also garnished the insurance company as his employer's debtor, and, as to this indebtedness, we did say that there could be none, notwithstanding defense by the insurer. In that feature we are content to modify the *Aetna* case.

The petition is denied.

[No. 13069. Department One. February 9, 1916.]

H. L. KETLER, *Respondent*, v. M. E. MURREY *et al.*,
Appellants.¹

INTOXICATING LIQUORS — SALES — LICENSE — SALES IN QUANTITY. Rem. & Bal. Code, §§ 2962, 6268, making it unlawful to sell intoxicating liquors without first obtaining a license, have no application to sales in quantity together with a hotel and saloon where the seller was closing out his business as a dealer in intoxicating liquors.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 11, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Affirmed.

J. W. A. Nichols, for appellants.

J. W. Selden and *Gordon & Easterday*, for respondent.

CHADWICK, J.—Respondent purchased a hotel, restaurant, and saloon from the defendants. They refused to make delivery upon the ground that the stock of goods consisted, in part, of two kegs of beer, a barrel of whiskey containing some seven or eight gallons, and several bottles of liquors and wines. Appellants rely upon the statute, Rem. & Bal. Code, §§ 2962, 6268:

“Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, and upon conviction thereof shall

¹Reported in 154 Pac. 1084.

be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not to exceed six months, or by both fine and imprisonment, for each offense.”

“Nothing in this act shall be held or construed to allow any person, firm, or corporation to barter, sell, or otherwise dispose of any spirituous, malt, fermented, or other intoxicating liquors without having first obtained a license therefor, as required by the provisions of this chapter, except as provided in section 6275, *infra*.”

The court below held that a license to sell in quantity was not necessary where the seller was closing out his business as a dealer in intoxicating liquor. The holding was correct. Statutes such as our own are directed to the regulation of traffic in intoxicating liquor and not to the transfer of property in it. Black, *Intoxicating Liquors*, p. 139.

In *Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. 889, under a statute as broad as our own, the supreme court of Michigan held that a sheriff holding intoxicating liquors under a writ of attachment did not need a license to sell on execution sale; that his act did not fall within either the letter or the spirit of the statute, which was directed only to those engaged in the business of selling intoxicating liquors. We note this case because appellants contend that all the cases cited by respondent are to be distinguished as covering sales made by public officers in the performance of their duty. If appellants' reasoning be good, it would not be possible so to distinguish the cases, for the statute uses the words “any person,” and a sheriff or other officer would fall within the letter of the law. If it were admitted that the sale by a sheriff could be so distinguished, it would not follow that a sale by an assignee of a debtor or an administrator was a sale under the compulsory process of a court, and yet it is held that a sale by either of these agents does not fall within the meaning and intent of the law.

In *Williams v. Troop*, 17 Wis. 478, the court said:

“He [an administrator] is a person whose plain legal duty is to sell property, collect and pay the debts and settle up the

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estate committed to his charge. In performing this duty and disposing of the spirituous liquors belonging to the estate, it is no more necessary for him to obtain a license, than it would be for a sheriff to obtain one before he could sell liquors taken upon an execution."

And the like rule was applied to an assignee in *Gignoux v. Bilbruck*, 63 N. H. 22. In *Forwood v. State*, 49 Md. 531, in discussing the law of the case, it is said if the vendor "had disposed of them [stock of liquors] at a private sale, by wholesale and at one time in good faith, solely for the purpose of closing his business, and not in the continued prosecution of his business, this would not have been in our judgment any infraction of the license laws."

In *Hagerty v. Tuxbury*, 181 Mass. 126, 63 N. E. 333, the holding is epitomized in the syllabus:

"One owning an interest in a liquor saloon and its stock in trade, but having no license to sell intoxicating liquors, lawfully may sell to his partner his interest in the saloon and the intoxicating liquors it contains."

We find the judgment of the lower court well founded in reason and sustained by ample authority.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13127. Department Two. February 9, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v.
NELLIE BROWNLOW, *Appellant*.¹

CRIMINAL LAW—EVIDENCE—CONFESSIONS. A voluntary confession to a police officer is admissible, although accused was not reminded that she was under arrest and not obliged to reply and that her answer could be used against her.

WITNESSES—PRIVILEGE OF ACCUSED—FORMER CONVICTION. It is not an invasion of any constitutional right to ask, on cross-examination, whether the accused had ever suffered conviction before.

CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. Error cannot be predicated on a question to which no objection was taken.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—FORMER CONVICTION. It is not error in charging the jury to mention that there was evidence of a former conviction, where the jury were told that it only affected the credibility of the accused.

CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be predicated on instructions to which no exception was taken.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 5, 1915, upon a trial and conviction of grand larceny. Affirmed.

Will H. Thompson, for appellant.

Alfred H. Lundin, *John D. Carmody*, and *Joseph A. Barto*, for respondent.

BAUSMAN, J.—Appellant, convicted of grand larceny, presents as a first grievance the lower court's admitting her confession made to a police officer during arrest and in jail. The confession was properly admitted. It was not necessary to remind her that she was under arrest, that she was not obliged to reply, and that her answers would be used against her. There was no inducement, fear, or threat. The state-

¹Reported in 154 Pac. 1099.

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ment was voluntary. Rem. & Bal. Code, § 2151 (P. C. 135 § 1151); *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Royce*, 38 Wash. 111, 80 Pac. 268; *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Testifying for herself, she was asked on cross-examination whether she had ever suffered conviction before, to which she answered that she had. No objection was made. Nevertheless, it is argued that here was an invasion of a constitutional right. The court, it is said, should have itself protected her. This we cannot sustain. Defendant, taking the stand on her own behalf, warrants her credibility as a witness and invites the impeaching question. There was no error in that question, and failure to object to it, moreover, is acquiescence. The situation is clearly not that in *State v. Jackson*, 83 Wash. 514, 145 Pac. 470, where it was the trial judge himself who put certain questions, and where we held that exceptions against his course were not necessary for reasons peculiar to his relation to trial.

Neither did the judge in the present case bring himself within the rule of that case, when, in charging the jury, he mentioned that there was evidence introduced showing previous conviction, for he was careful to add that it was no proof of defendant's guilt in the pending trial but only touched her as a witness. Besides, to this, also, no exception was taken.

Judgment affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

[No. 12800. Department Two. February 10, 1916.]

H. A. TEMPLETON, *Appellant*, v. JOHN F. WARNER *et al.*,
Respondents.¹

APPEAL—TIME OF TAKING—BEFORE OR AFTER JUDGMENT. Where a notice of appeal, served after signing but before entry of the judgment, was not filed until after the entry, the appeal was not "taken" until after judgment.

SPECIFIC PERFORMANCE — SALE OF STOCK — REMEDY IN DAMAGES. Specific performance of a written contract to buy stock and deliver a note in payment will not be granted in the absence of circumstances making a note indispensable; since the action is one for damages, and it is immaterial that the stock was that of a close corporation and of no value if left in the seller's hands.

FRAUD—REPRESENTATIONS—OPINIONS. Fraud as a defense to an action for breach of contract to buy stock is not established by evidence of representations which amount to mere opinions, and which the witness was not sure had ever been uttered.

PARKER, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 15, 1914, upon findings in favor of the defendants, in an action for specific performance. Reversed.

Trefethen, Grinstead & Laube, for appellant.

McClure & McClure and *Robert McMurchie*, for respondents.

BAUSMAN, J.—The service of this appeal was after the signing, and before the entry, of the decree. Its filing was after that entry. The filing being a part of the taking of an appeal under our statute, we hold that there was here an appeal after, and not before, a judgment. A motion to dismiss is consequently overruled. We also notice, but find it unnecessary to discuss, a motion to strike the statement of facts. That, too, is denied.

This suit was begun in equity for specific performance, or damages as a mere alternative, of a written contract to buy

¹Reported in 154 Pac. 1081; 157 Pac. 458.

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shares of stock and to deliver a note in payment of them, but plaintiff has no standing in equity, as he alleges no circumstances making a note peculiarly indispensable to his rights. His grievance was a proper one for damages only, and so the court ruled. The case then proceeded at law without a jury, as neither side claimed one or objected to that procedure.

We have here a shareholder agreeing in writing to buy the stock of another shareholder who was also manager. The defendant, while he did not know as much about its affairs as plaintiff, was very far from being ignorant of the condition, and six months before he had warned plaintiff to do better as manager. Entering into the agreement after long discontent, he would now escape by showing that plaintiff represented certain assets, the bills payable, to be worth substantially more than they were. The agreement itself contains no warranties or representations at all. We do not find in the whole testimony anything to prove that any representations were false, that the few so-called representations uttered were other than mere opinions about value, that any opinions were regarded as important or given as inducements, or that defendant went into the bargain because he relied on them.

What shall be said of a person who, endeavoring to brand another with fraud, can put his grievance so weakly as this: "I know he told me the business was in good shape, and it appears to me he told me that the bills receivable and bills payable were about equal, but I will not say for sure he did?" It is not thus that fraud is to be put in another man's mouth, and he but pretends to have placed reliance on words who is not sure that they were ever uttered.

The lower court having sustained this defense, the judgment must be reversed, and since, sustaining the defendants, the learned trial judge did not feel called upon to measure plaintiff's damages, and the record here is not such that this court can do so, the cause is remanded for further proceedings not inconsistent with this opinion.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

PARKER, J. (dissenting)—I am unable to view the facts as they are viewed by my brethren in the foregoing opinion. I think the representations made by the appellant were false and such as to entitle respondent to avoid the sale contract, in view of appellant's knowledge of the business affairs of the concern and respondent's want of knowledge thereof.

ON PETITION FOR REHEARING.

[Decided May 9, 1916.]

PER CURIAM.—Appellant, in petition for rehearing, argues again for specific performance. The stock, he says, was that of so close a corporation that there could be no market for it when left on his hands. Now, this was not the buying of rare stock necessary to a control, but the selling of it and selling it at a given price. Appellant himself argues that damages are recoverable at the contract price with a mere holding of the stock hereafter subject to defendant's order. So the stock is already sold and defendant is to pay for it. It is plainly a case for damages, and it would not follow that, supposing the situation to be reversed and respondent entitled to specific performance because of the rarity of the stock, appellant would be entitled to it. Nor did we remand this cause for further hearing for want of a measure of damages, but for want of data to apply.

Passing specific performance, appellant contends that there is already testimony sufficient for the assessment of damages here. Assuming the measure to be the contract price, he properly demonstrates that price and the amount of the note that was to be given for it by a calculation prescribed in the contract itself. Yet the data is wanting still. The bills receivable that could be discarded out of the assets in the calculation are not established in amount and number, and we shall not charge the defendant with the full amount of these for the mere reason of his refusal to perform the contract. Additional reason for further proof below is manifest in the fact that the interest on the note was not fixed by

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the contract but was to vary with the profits of the three preceding years. Now, these were not shown, other than that for about a year before there had been none. We are, therefore, left in the dark as to what rate of interest should be included in the damages from the date of the note to the date of the judgment.

Appellant's petition is denied. There is also denied the petition by respondents.

[No. 18037. Department One. February 15, 1916.]

BEN OECHSLI *et al.*, Appellants, v. WASHINGTON ELECTRIC RAILWAY COMPANY, Respondent.¹

RAILROADS—RIGHT OF WAY DEED—CONSTRUCTION—ABANDONMENT—LIMITATIONS. Where a right of way deed for an electric railway provided for a forfeiture and reversion in case the railroad should be "abandoned," the next clause, providing that "rights hereby granted shall not determine in any event prior to the expiration of the period of two years," is not a limitation on the grant fixing the time within which the road must be built, but is a limitation on the right to declare a forfeiture, qualifying the preceding clause for the benefit of the grantee.

SAME—RIGHT OF WAY—DEED—FORFEITURE—ABANDONMENT. Under a right of way deed for an electric railroad, providing for a forfeiture and reversion "if said railroad shall be abandoned," a delay in or failure to electrify the road within a reasonable time is not ground for forfeiture of the grant, nor any evidence of an abandonment of the road.

SAME. In such a case, the jury could not infer an abandonment of the intention to electrify the road, where it appears that the construction was not completed and that the grantee was setting electric poles and placing copper plates on the rails for the purpose of electrification, and negotiating for electric power.

SAME—RIGHT OF WAY DEED—VIOLATION OF TERMS—REMEDY OF GRANTOR—INJUNCTION. Where a public service corporation had constructed a railroad under a right of way deed for an electric road, the grantor's only remedy is for damages, and injunction against

¹Reported in 154 Pac. 1079.

operation does not lie, if the company violates the terms of the grant by permanently abandoning the use of electricity for steam, where that was not made a ground of forfeiture in the deed.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 4, 1915, in favor of the defendants, dismissing an action for equitable relief, tried to the court. Affirmed.

W. A. Reynolds, for appellants.

Forney & Ponder and *C. D. Cunningham*, for respondent.

ELLIS, J.—Action to cancel a deed of a right of way for an electric railway because of an alleged failure of the defendant, as successor in interest to the grantee, to comply with the terms of the grant. Plaintiffs also seek to enjoin the maintenance or operation of any railroad on the right of way, and to recover damages for injury to the land caused by the construction of a roadbed across it.

Omitting acknowledgment and description, the deed reads:

“Know all men by these presents: That Ben Oechsli and Christiana Oechsli, husband and wife, in consideration of the sum of \$1 to them in hand paid, and the benefits to accrue to them by reason of the operation of an electric railroad over the lands herein described, do hereby grant and convey to George A. Robinson, his heirs, successors, or assigns, a right of way for the construction, operation and maintenance of a railroad; said right of way to be thirty-five feet wide on each side of center line of said railroad as the same shall be definitely located and constructed over and across the following described premises, to wit: [describing property and location of right of way].

“The right hereby granted shall be held and possessed by the party of the second part, heirs, successors, and assigns so long as he, or his successors, heirs, or assigns shall maintain and operate such railroad over and across the lands aforesaid, provided, however, that if said railroad shall be abandoned all right hereunder shall cease and the right in and to the lands hereby granted shall revert to the grantor herein, or his heirs or assigns without notice or declaration of forfeiture and the same as if this contract had not been

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made, but the rights hereby granted shall not determine in any event prior to the expiration of the period of two years from the date hereof.

"The right of way to be properly fenced on both sides and provision made for station at or near county road, if demanded, to have half acre of additional land for station purposes.

"Witness our hands and seals the 25th day of March, 1910.

"Ben Oechsli

"Christiana Oechsli."

It is conceded that the defendant is a public service corporation and has acquired the interest of Robinson. It has constructed a railroad from Chehalis for a distance of about seven and a half miles, running through the plaintiffs' land, which lies about four miles from Chehalis. It has acquired a right of way some distance further, and the railroad is still in process of construction. For about three years, trains have been operated by steam over the road through plaintiffs' land, mainly in connection with construction work, but whatever freight is offered is hauled for hire. Poles for electrifying the road have been set from Chehalis through plaintiffs' land, and have been distributed for setting to a considerable distance further. Copper plates are placed at the rail joints for use in operating the road by electricity. Of the plaintiffs' land, one-half acre, selected by them, has been fenced for a station, and a switch has been constructed thereon. The entire right of way across plaintiffs' land has been fenced.

Defendant, for a considerable time, has been negotiating for electrical current with a power company which has a high-power transmission line running alongside the road as far as the plaintiffs' land, but no contract has yet been consummated. The evidence shows that, in order to use this current, it would be necessary, at great expense, to install transformers at substations to reduce the voltage. It is fairly deducible from the evidence that the business which the road would get over the short distance to which it has

been constructed would not justify the expense of electrifying it at the present time, but the defendant's president testified that it is the intention to do so when the road shall have been completed from Chehalis to Onalaska, where there is a large mill, and expressed the belief that this would be done within the next year and a half. He also testified that the work has been much delayed by financial conditions and by suits in condemnation for completing the right of way. At the close of the evidence, the court, on defendant's motion, withdrew the case from the jury and dismissed it. Plaintiffs appeal.

Appellants claim that the clause in the deed declaring that the "rights hereby granted shall not determine in any event prior to the expiration of the period of two years from the date hereof," fixes a limitation within which the road must be built and in operation to avoid a forfeiture. We think not. This clause, when read in context, was clearly inserted for the grantee's benefit. It was intended to qualify the immediately preceding provision that, "if said railroad shall be abandoned, all rights hereunder shall cease and the right in and to the lands hereby granted shall revert to the grantor herein," etc. The provision, as a whole, makes plain the intention of the parties that the only ground for a forfeiture shall be the abandonment of the railroad. The final clause was intended to preclude even the failure to commence work within two years from being construed as an abandonment. It is a limitation on the right to declare a forfeiture, not a limitation on the grant.

It is next contended that the grant was for an electric railroad, and that there was sufficient evidence to take the case to the jury on the question whether a reasonable time had elapsed in which to electrify the road. This question is interesting but foreign to the issues. The action was one for a forfeiture, an injunction, and for damages to the land occasioned by the grading of the roadbed. None of these remedies is available under the deed for any delay in any

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detail of the work, but only for an abandonment of the railroad. The failure to electrify the road within a reasonable time, though it might be made ground for an action in damages for the additional servitude imposed by the use of steam as a motive power instead of electricity, is no ground for a forfeiture of the grant, nor for an injunction, and obviously neither augmented nor diminished the physical damage to the land occasioned by grading the roadbed. The deed does not provide for a forfeiture because of any delay in electrifying the road. The failure to employ electricity as a motive power was no evidence of an abandonment of the railroad, which was the only condition for a forfeiture. There was no evidence whatever of such abandonment. Whether, therefore, the deed be viewed as a grant with a condition subsequent, or of an estate limited upon a contingency, can make no difference. If viewed as the former, the condition is in process of performance. If as the latter, the contingency has not arisen. *Mouat v. Seattle, Lake Shore & Eastern R. Co.*, 16 Wash. 84, 47 Pac. 233.

Neither was there any evidence of an abandonment of the intention ultimately to electrify the road, even if the deed could be so construed as to make the abandonment of that intention a ground of forfeiture. All of the evidence pointed the other way. The setting of the poles and the placing of copper plates for that purpose verify the president's testimony that such is the ultimate purpose. There was no evidence from which the jury could have inferred an abandonment of that purpose. By the terms of the deed, abandonment, not mere delay, is the only ground of forfeiture.

In any view of the case, the respondent is certainly in no worse position than it would have been had it entered upon the appellants' land and constructed the railroad without any deed but with their knowledge. Being a public service corporation invested with the power of eminent domain, it could not be ejected from the land nor enjoined from the operation of its road. In such a case, under the rule to which this

court is committed, the appellants' only remedy would be to recover damages in the value of the land taken and for injury to the land remaining. *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304; *Domrese v. Roslyn*, ante p. 106, 154 Pac. 140. But the respondent here entered and constructed its road under a grant of the right of way. Obviously and *a fortiori*, if it were conceded that it had violated the terms of the grant by permanently abandoning the intended use of electricity for that of steam, the appellants' remedy would be, as we have said, only the damages, if any, to their land resulting from the added servitude. No such case was presented by the pleadings, and no evidence tending to prove such damage was introduced or offered so as to warrant a court amendment and a submission of that issue to the jury. Since no such issue was presented, nothing that we have said can be construed as *res judicata* of that issue should the respondent eventually abandon all intention to electrify the road or unreasonably delay that course to the appellant's damage.

The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

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[No. 13114. Department Two. February 15, 1916.]

NORTHWEST MOTOR COMPANY, *Appellant*, v.CHARLES BRAUND, *Respondent*.¹

CORPORATIONS—ACTIONS—CONDITION PRECEDENT—PAYMENT OF LICENSE FEE. Rem. & Bal. Code, § 3715, providing that no corporation shall commence or maintain any suit without alleging and proving that it had paid its annual license fee, being merely a revenue measure, is sufficiently complied with by payment before argument for new trial and entry of findings and decree; especially where defendant took judgment on a counterclaim which the corporation was forced to defend.

REFORMATION OF INSTRUMENTS—FRAUD — EVIDENCE — SUFFICIENCY. A written contract for the sale of an automobile cannot be reformed for fraud in failing to incorporate in it certain guarantees, upon evidence of the purchaser that he failed to read it when assured that it was only a form, nothing having been done to keep him from doing so, and it appeared by other evidence that he read the whole contract and objected to certain terms; since the fraud must be established by a preponderance of substantial and clear testimony.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 6, 1915, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

George R. Biddle and Knight & Muscek, for appellant.

Burkey, O'Brien & Burkey, for respondent.

BAUSMAN, J.—Action at law tried without a jury, plaintiff suing for the balance upon a conditional sale contract of a second-hand automobile. Defendant, admitting that he had made the contract, answered that it contained terms expressly excluding guaranties when in point of fact it should have contained those guaranties. Demanding reformation, he sets up violated guaranty of workmanship, materials, and condition, and counterclaims for damages. Judgment was rendered in his favor on these counterclaims.

¹Reported in 154 Pac. 1098.

Plaintiff's annual corporation license fee, under Rem. & Bal. Code, § 3715 (P. C. 405 § 349), was unpaid until after trial. It was, however, paid before the argument for new trial and before the entry of the findings and the decree. We hold this to be a sufficient compliance with the statute to enable plaintiff to conduct this suit, for, as we have previously held, the statute is but a revenue measure and we have no hesitation in extending to this situation the doctrine of *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144. There is additional reason here because defendant has not only counterclaimed, but takes judgment under that counterclaim against this plaintiff, in consequence of which plaintiff, being forced to defend, is in substantially a similar situation to that of plaintiff in *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605.

The lower court found that defendant signed the contract under false assurance as to its contents, and that it should have contained the guaranties. But this is another case in which we must insist that fraud be made out by the substantial weight of the testimony. To begin with, defendant not only was able to read, but admits that, before signing the contract, he looked into it and objected to the rate of interest. The others refusing to change it, he submitted to that, so if the thing does not speak defendant's mind, the fault is his own.

If they are to be set aside or altered upon no stronger showing than is made here, the sanctity of writings is done for. Substantially the most that can be said of defendant's testimony is that, at the time of the signing, he did not read the contract and was assured that it was only a form. But the plaintiff company for its part denies this, claims that the paper was actually read to the man, produces the writing itself with his signature, and asserts that they understood it to mean what it says. It is not even pretended that cunning or unusual means were employed to keep him from reading the contract. No man shall escape his bargain on testimony like this. It is to avoid just these disputes that contracts

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are put in writing. To overturn these, there must be not merely some, though roundly asserted, testimony, but a preponderance of testimony, substantial and clear.

The cause is reversed, with instructions that judgment be entered in favor of plaintiff as requested by plaintiff in its first conclusion of law, less the sum of \$25, adjudged due defendant by the court in its sixth finding, on account of tools constituting a part of the car and not delivered with it. Remanded accordingly.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13123. Department Two. February 15, 1916.]

JOHN R. KNIBB, *Respondent*, v. AUGUST W. MORTENSEN *et al.*, *Appellants*.¹

MECHANICS' LIENS—CLAIM—EXCESSIVENESS—BAD FAITH. A mechanics' lien must be made in good faith, and is violated by wilful excess, where it appears that the claimant included a \$300 indemnity deposit not subject to lien and other foreign items, making it twice the amount that he could honestly have thought himself entitled to, and filed the same after an award of arbitrators against him, which he had invoked but refused to adopt.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 7, 1915, in favor of the plaintiff, in an action to foreclose a mechanics' lien. Reversed.

Aust & Terhune, for appellants.

James T. Lawler, for respondent.

BAUSMAN, J.—Plaintiff, agreeing in writing to build the Mortensens their dwelling for \$1,064, deposited a certified check for \$300 to secure his good performance. The Mortensens paid him \$818, and admit that they owe, and they now tender, \$259, which includes a trifling extra. Knibb, claim-

¹Reported in 154 Pac. 1109.

ing many more extras, invoked an arbitration clause on that feature, but received an award of only \$247.25. He then filed a mechanics' lien for substantially twice what the arbitrators allowed him and the \$300 deposit besides, or, in exact figures, \$814.95. The lower court allowed him in the present foreclosure of the lien only \$100 more than the arbitrators had allowed him.

The respondent owner contends that the whole lien is bad because of its containing an obvious and wilful excess. That contention we must sustain. The \$300 was clearly no ingredient under our statute, and the lower court had to throw out, besides, other foreign items. There was no time when this plaintiff could honestly have thought himself entitled to more than half of what he claimed in his notice of lien. His claiming more was wilfully unfair, for it was done after the award of the arbitrators, whose decision he does not repudiate and yet will not adopt, and which, moreover, he uses in his complaint and in his argument here to put the other side in the position of waiver on sundry features.

In *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721, we held that wilful excess would vitiate the whole lien, and in *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912 B. 225, we reached the same conclusion, where the excess was very great though without evidence of bad intent. These lien laws tend to burden the sale of property. They must be claimed in good faith. The law will not, indeed, punish the lienor for trifles included, or even for large sums which are fairly debatable in law. But it will not allow an obvious misuse of the statute. This contractor has burdened a little dwelling with twice as much as he had a right to claim by lien, and, in our opinion, he did it wilfully out of an ill humor which is exhibited in sundry features of the record. Where excessive items are claimed, the defendant owner has the right to his trial by jury, which the plaintiff here has avoided by proceedings under lien.

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The cause will be reversed, with instructions that the action be dismissed without prejudice to a suit at law by the plaintiff upon the same subject-matter.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13247. Department Two. February 15, 1916.]

U. KILLINGSWORTH, *Respondent*, v. F. W. KEEN, *Appellant*.¹

HUSBAND AND WIFE—TORTS OF WIFE—LIABILITY OF COMMUNITY. Neither the husband nor the community is liable for the tortious act of the wife in taking and damaging an automobile, in view of Rem. & Bal. Code, § 5929, providing that, for all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible except where he would be jointly responsible with her if the marriage did not exist.

SAME. In such a case, it is immaterial that the injured party might waive the tort and sue as upon implied contract, where the wife's act was a tort to begin with.

SAME—TORTS OF WIFE—ACTIONS—PLEADING—WAIVER. In an action for the wife's tort in taking and damaging an automobile, the allegation that the taking was for the "benefit of the marital community," is insufficient, as against demurrer, to plead the defendant's acquiescence or authorization, or to overcome the presumption that it was not for the benefit of the community, no sustaining facts being pleaded.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 7, 1915, in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Israel & Kohlhasse, for appellant.

BAUSMAN, J.—Keen, sued by his chauffeur for wrongful discharge outside of the state, sets up as a counterclaim that the chauffeur's wife took another automobile of Keen's out of his garage and used it "for the benefit of the marital community of the plaintiff and herself" for a period of four

¹Reported in 154 Pac. 1096.

hours, during which time she damaged it. The counter-claim was to recover the value of its use as well as the cost of the repair. Plaintiff demurred to this as an attempt to set off tort against contract. Error is assigned on the lower court's sustaining that demurrer.

As the answer does not show, and as it is not claimed in argument, that the wife's taking the automobile was other than tortious, the husband and the community property are protected against liability in that respect by Rem. & Bal. Code, § 5929 (P. C. 95 § 18), as follows:

"For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in case where he would be jointly responsible with her if the marriage did not exist."

We have had occasion to remark, in a suit upon false representations by a wife, that we know of no statute making the community property liable for them. *Strom v. Toklas*, 78 Wash. 223, 138 Pac. 880.

Appellant argues that this is one of those torts which the injured party may waive in its tort aspect and sue upon as creating an implied promise to reimburse for value appropriated. Assuming, but not deciding, that, still it cannot be applied here. Keen might, indeed, be permitted to do this in an action between him and the wife, but here he is in litigation with a third person protected by statute. The wife's act was a tort to begin with. It cannot be made contractual against the husband unless he too waives the form of action.

The bare and general allegation "for the benefit of the marital community" does not oblige us to discuss under this statute the situations in which a husband by acquiescence, authorization, acceptance of profits, or otherwise may be estopped to question the community's or his own liability. The tort was presumptively not for the benefit of the community, and facts must be pleaded to disturb that presumption.

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Syllabus.

We have sustained conclusions against demurrer when facts, though defectively set out, accompanied those conclusions (*Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549), but to sustain them utterly without facts is contrary to the whole theory of code pleading. *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886, Ann. Cas. 1913 D. 786; *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

Judgment affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

[No. 12838. Department One. February 15, 1916.]

THE STATE OF WASHINGTON, *on the Relation of the Public Service Commission, Respondent*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.¹

ELECTRICITY — POWER COMPANIES — PUBLIC SERVICE CORPORATION — PRIVATE BUSINESS. Companies furnishing electrical energy may or may not be public service corporations, since a sale of surplus power for private purposes is not an engaging in a public business.

SAME — POWER COMPANIES — PRIVATE BUSINESS — SALE OF SURPLUS POWER — RIGHT TO REGULATE. The contracts of a public traction company by which it sells to private individuals its surplus electrical power pertain to its private business in which the state can claim no concern, and disclosures as to such contracts are not essential to an intelligent exercise of the state's function to regulate the company's traction business.

CONSTITUTIONAL LAW — POLICE POWER — LEGISLATIVE QUESTIONS. It is the province of the legislature to define the objects of the police power, and for the courts to determine whether the act is reasonably within the legislative power and the thing sought to be done fairly within the act.

ELECTRICITY — POWER COMPANIES — PRIVATE BUSINESS — POWER TO REGULATE — POLICE POWER. The courts will not declare the right of the state, under the police power, to regulate and control the price to be charged for electrical power sold to private individuals, in the absence of express legislative authority therefor.

¹Reported in 154 Pac. 1110.

SAME—POWER COMPANY — REGULATION — RATES — PRIVATE BUSINESS—POWER OF COMMISSION—STATUTES. The public service commission is given no power to inquire into the private contracts of a public traction company whereby it sells its surplus electrical power to private individuals, by 3 Rem. & Bal. Code, § 8626-1, declaring all companies selling electricity for light, heat or power for hire, to be public service companies, subject to regulation by the public under the jurisdiction of the public service commission; since the entire context of the act, providing for equality of service, physical valuation of property "used for the public convenience in the state," and that the commission shall ascertain the probable earning capacity of each such company "under the rates now charged," relates only to such uses as the public might compel, and the act nowhere seeks to regulate or control the price to be charged to private individuals in the incidental private business of selling surplus energy; there being no clear intent to disclose or bring such private business within the police power.

SAME. In such case, the "rates" falling within the scope of the act, must mean a charge to the public for a service open to all upon the same terms, and not a consideration of a private contract in which the public has no interest.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 26, 1914, in favor of the plaintiff, in mandamus proceedings, tried to the court. Reversed.

Graves, Kizer & Graves, for appellant.

The Attorney General and *Scott Z. Henderson*, Assistant, for respondent.

MOUNT, J.—Respondent brings a mandamus proceeding to compel a disclosure of private contracts.

The appellant is a traction company operating a street railway system in the city of Spokane and some interurban lines running out of Spokane into the surrounding country. It maintains a power plant which generates about twelve thousand horse power. Its present average need for its operations is about nine thousand horse power. Some years ago, at a time when its own power plant had not been completed, appellant entered into a contract to take each year

three thousand eight hundred horse power from the Washington Water Power Company, a power company operating in the same territory. With the development of its own plant giving approximately twelve thousand horse power, and the contract holding it to take three thousand eight hundred horse power from the Washington Water Power Company, appellant has a yearly supply of approximately sixteen thousand horse power, or about six thousand or seven thousand horse power more than its present average need, although at times it uses as much as twelve thousand horse power. This surplus it has sold under private contract to others and it has been put to various uses; its customers being a land company, one or two farmers who use the power for irrigation purposes, two manufacturing plants, a grain elevator, an irrigation company, and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spokane.

The object of this proceeding is to compel appellant to submit its private contracts to the public service commission, it being the theory of the commission that it has jurisdiction over that part of the appellant's business which heretofore has been regarded as private and in which the state had no interest; that it cannot make an adequate and intelligent survey of the rates charged by appellant in its service to the public without them; and further, that to regulate the rates for traction purposes, it must have a disclosure of all contracts and all activities yielding a revenue to appellant, whether they be private—entered into with individuals—or affect a public service only.

We understand the law in this state to be that companies furnishing electrical energy may or may not be public service corporations, depending upon the objects for which they were organized and the business in which they are engaged; the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally or is only an incident to the business in which the company

is engaged, as, for instance, a sale pending a time when its surplus will be needed to accomplish its assumption of duty to the public; for it has been held that a public service corporation can anticipate its future needs and develop energy reasonably in excess of present requirements. The character of such companies and their relation to the public has been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business, and gives such companies no right to assert the sovereignty of the state. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672; *State ex rel. Harris v. Olympia L. & P. Co.*, 46 Wash. 511, 90 Pac. 656; *State ex rel. Tolt Power & Transp. Co. v. Superior Court*, 50 Wash. 13, 96 Pac. 519; *State ex rel. Shropshire v. Superior Court*, 51 Wash. 386, 99 Pac. 3; *State ex rel. Dominick v. Superior Court*, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *State ex rel. Lyle Light, Power & Water Co. v. Superior Court*, 70 Wash. 486, 127 Pac. 104; *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

In all of these cases, the company was asserting the right of eminent domain in order to avail itself of the rights and privileges granted by statute to public service corporations. In the absence of controlling legislation, the court refused to extend the right. In the *Nisqually Power Co.* case, we even held the use of the word "private" in a legislative act to have been inadvertent and therefore surplusage. The court has not inclined to the thought that corporations not directly engaged in the sale of power to the public generally should be clothed in the garb of the state, in the absence of

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an unquestioned intent on the part of the legislature so to do.

The case at bar is presented from the other angle. The company is insisting that its contracts with private individuals for the sale of excess power are of no concern to the state because they pertain to private business in no way affecting the public, while the state is insisting that such contracts are essential to an intelligent exercise of its admitted function to inquire into and regulate appellant's traction rates. In other words, appellant rests upon the law as we have heretofore found it to be, and respondent insists that the court has indicated a purpose to relax the rule in the later cases: *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; *State ex rel. Lyle Light, Power & Water Co. v. Superior Court*, and *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, *supra*; *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994; or, if not, the act of 1911 (Laws 1911, p. 541, § 8; 3 Rem. & Bal. Code, § 8626-8) is ample to sustain the right of respondent to inquire into and control that part of the business of appellant which has heretofore been considered as private and not a proper subject of state control.

To review the cases in detail would serve no purpose. We have discovered in them no purpose to depart from our former holdings. There may be some expressions in cases involving collateral questions which seemingly touch the question under discussion and which may give impulse to the thought that we had it in mind to modify some of our decisions; but the fact remains that, whenever the exact question has been submitted to the court, it has held to the doctrine of the earlier cases, that is, that the sale of power to be used by others for traction purposes, lighting, manufacturing, etc., is not a public use, and that the sale of surplus power, or the difference between the ordinary requirements and the peak load by a corporation which does do a public service business, when such surplus is not in use, is only an incident to the public employment of which the law will take no no-

tice. Notwithstanding the criticisms of counsel, there is sound reason for our former holdings, to which we shall advert when discussing the next phase of the case.

The final controlling question is whether the act of 1911 has extended the jurisdiction of the public service commission over power companies regardless of the character of the business in which they are engaged. Counsel for respondent says:

“We may rest our case on the proposition that, irrespective of any question of eminent domain, the contracts of appellant are ‘clothed with a public interest,’ and therefore subject to regulation, and that the determination of the policy of regulation is for the legislature.”

Counsel for appellant admits:

“The sole question in the case is whether the defendant’s power business is a public business, in view of the uses to which the power sold by it is put, and is therefore subject to the jurisdiction of the public service commission.

“If it is within the legislative power to make public a business conducted as defendant’s power business is, undoubtedly the legislature has done so and the case was rightfully decided. It is an electrical company and owns an electric plant within the definitions of the statute. (Laws 1911, p. 541, § 8; 3 Rem. & Bal. Code, § 8626-8.) The act makes no distinction between an electrical company selling its product for public purposes and one selling for private purposes. All such companies selling ‘electricity for light, heat, or power for hire’ are declared to be public service companies, subject to regulation by the public, and under the jurisdiction of the public service commission.”

This leads us to a construction of the statute. The purpose of the state in creating the public service commission was to regulate “public service properties and utilities.” In the *White River Power Co. case*, *supra*, we held the question whether the legislature could clothe power companies with a public character open, saying:

“We do not mean to say that the right of eminent domain can, in no case, be extended to a corporation organized for

the purpose of generating and transmitting electricity for power and other purposes. But before this can be done, public necessity must require it, and the right of the public to the use and the enjoyment of the property must be regulated, guaranteed, and safe-guarded by proper legislation."

It is argued that the present act (Laws 1911, p. 538; 3 Rem. & Bal. Code, § 8626-1 *et seq.*) furnishes ample authority for holding that public necessity, as evidenced by the legislative declaration, now requires that such companies be held subject to regulation in their private affairs, and that the right of the public to the enjoyment and use of such property is regulated, guaranteed, and safeguarded by appropriate legislation. But we think the act does not go so far. That it assumes jurisdiction over power companies and electrical companies may be conceded, but we find nothing that compels the conclusion that the legislature intended to inquire into or regulate such companies, except in so far as their business affects the right of the whole public to their products upon fair or reasonable terms.

Granting, for the sake of argument, the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is, in character and extent of operation, such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, and *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, rest.

Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power, but primarily the assertion of police power

is for the legislature. They are not disposed to hold that a thing should be done by an individual or by the whole public because the public welfare demands it. They have acted only after the legislature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether a legislative act is reasonably within the legislative power and the thing sought to be done is fairly within the terms of the act. And it is well that it is so, for the legislative body can extend the domain of the police power with sufficient rapidity. There is no reason why the courts should engage in a rivalry with it.

At the time the act of 1911 was passed, the law was well defined and certain in its terms. The sale of power to individuals or companies to be in turn sold was not a public use. The rule and the cases declaring it must have been well understood by the legislature. Yet the act nowhere attempts to cover any use theretofore deemed to be private. Its whole context seems to compel the thought that it had in mind only such uses as the public might compel. There is nothing to indicate a legislative intent to declare that the sale of surplus or secondary power pending a future use by a company in the performance of its public functions is a thing that affects the general welfare, the health, peace or happiness of the citizen, or that it is in any way necessary to sustain the right of the state to govern.

Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to any one other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus.

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The act of sale is purely voluntary. Like the merchant, it can sell at one price to one man and at another price to another. The parties to the contracts are not complaining. If either is not content with the offering of the other he does not have to contract. He can go his way. But it is not so with appellant when exercising its public function, that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances and without exclusive conditions. Beale & Wyman, Railroad Rate Regulation, § 1.

The only interest the state can have in such contracts is that they may not be made and persisted in to the detriment of the public. They are made subject to the paramount undertaking of the company and must give way to the public interest if necessity requires. If at any time the state, acting through its accredited agency, puts a burden upon a public service corporation which requires the use of its surplus energy, it must devote such energy to the public use and abandon its private contracts, for they are no longer mere incidents to the undertaking in which the public has no interest, but are an incumbrance upon a public service. A private contractor could not compel specific performance of his contract as against an intervening public right. Thus reasoning, it follows that inquiry into these collateral matters is not essential to the performance of the public functions of the respondent. The commission insists that it cannot find a basis for rate making without knowing the private as well as the public affairs of the appellant. Granting that the appellant is entitled to a fair return upon its investment and the public to a fair rate of transportation, to hold that respondent could figure appellant's private contracts as a basis for rate making would in turn compel the holding that appellant would be entitled to take from the public enough to make good its losses in its private enterprises. The state has no interest, either in appellant's gains or losses in its

private enterprises. It has not yet assumed to stand as an inquisitor or conservator in private business.

The act creating the commission reflects no more than an intent to care for every right of the public in so far as they relate to the public functions of a public service corporation. It provided for equality of service, a physical valuation of "the total market value of the property of each public service company operating in this state, *used for the public convenience within the state*," and that the commission shall "ascertain the probable earning capacity of each public service company under *the rates now charged* by such companies," that is, rates for service falling within the scope and intendment of the law, for "rates" must be held to mean a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.

This holding makes it unnecessary for us to inquire into the power of the legislature to assume a control over business of a private nature, or whether such an act, being passed, raises a legislative or judicial question. It is enough that the public service commission law does not go to that extent in its letter, and cannot be held to have gone to that extent by construction without doing violence to the manifest purpose and spirit of the law.

Remanded with instructions to deny the writ.

MORRIS, C. J., CHADWICK, and ELLIS, JJ., concur.

FULLERTON, J., concurs in the result.

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Syllabus.

[No. 12874. Department Two. February 15, 1916.]

GUST ANEST, *Administrator etc., Respondent*, v. COLUMBIA
& PUGET SOUND RAILROAD COMPANY, *Appellant*.¹

COMMERCE—INTERSTATE COMMERCE—TRACK INSPECTORS. One employed in inspecting the main line of an interstate railroad doing also an intrastate business, to see that no obstruction or defects existed, is engaged in interstate commerce.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—REVERSED ENGINE—FAILURE TO KEEP LOOKOUT—EVIDENCE—SUFFICIENCY. A finding of negligence, as a matter of fact, in running down a track inspector, is sustained by the evidence, where it appears that he was struck while alighting from a speeder by a lone engine backing around a curve, that the rules of the company required a forward lookout on the end car of backing trains and provided that an engine without cars in service on the road shall be considered a train, that no forward lookout was placed on the tender, and that the fireman and also the brakeman, who was looking ahead from the cab window, had an unobstructed view of the track for 1000 feet, that the fireman first discovered the speeder when within 150 feet and gave the signal to stop, and that the brakeman first discovered it when within 300 feet, but gave no signal to stop, and that the engineer stopped the engine when within about 300 feet after receiving the fireman's signal.

SAME—CONTRIBUTORY NEGLIGENCE—TRACK INSPECTOR—EVIDENCE—SUFFICIENCY. A track inspector whose duty it is to look out for the safety of the trains as well as himself, and who allowed himself to be overtaken on a curve in a situation where he could not stop in time to get off the track, was guilty of contributory negligence.

SAME—CONTRIBUTORY NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE. Under the Federal employers' liability act, the contributory negligence of the plaintiff does not bar a recovery, but reduces the amount proportionally as the negligence of the defendant and of the plaintiff contribute to the causation of the injury.

SAME. The negligence of a track inspector on a speeder, who failed to keep a lookout for a train following until too late to extricate himself, contributed to the causation equally with the negligence of the defendant's train crew on a lone engine in failing to discover him on the track in time to avoid running him down.

¹Reported in 154 Pac. 1100.

SAME—ASSUMPTION OF RISKS—NEGLIGENT OPERATION OF TRAINS. A track inspector on a speeder does not assume the risk of engines being run over the road reversed without proper lookout or warning being given to avoid running him down.

SAME—FEDERAL EMPLOYERS' LIABILITY ACT—PROPORTIONATE RECOVERY. In an action for wrongful death, under the Federal employers' liability act, the defendant is not concerned with and cannot complain of the apportionment of the judgment between the widow and minor children of the deceased.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 21, 1914, upon findings in favor of the plaintiff, in an action for wrongful death, tried to the court. Modified.

Farrell, Kane & Stratton and *Stanley J. Padden*, for appellant.

Higgins & Hughes, Revelle, Revelle & Revelle, and *James McCabe* (*Hyman Zettler*, of counsel), for respondent.

HOLCOMB, J.—On Sunday, December 15, 1912, Keneages Flengern, while employed in inspecting appellant's railroad track by the order of his immediate superior, the section foreman, was killed. He was riding eastward from Renton upon a "speeder," or hand car, operated by himself at the time. The morning was cold and stormy, and the deceased had on, when found immediately after the accident, a Swedish cap with flaps fastened over his ears and tied under his chin. At a point about one thousand feet east of a bridge called bridge No. 7, there is a curve to the south in the track. An engine without any car attached was backing down across the bridge, eastward and around the curve, at a speed of about twenty miles per hour. It was running from Renton to Maplewood Farm to "pick up" a car. There were on this engine the engineer, fireman, and a brakeman. The engineer was in his place on the seat box at the right side of the engine when facing toward its head or left side of it as it was going, and the fireman and brakeman sat on a seat box on the opposite side, except when the fireman was

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attending to his duties. There was no man stationed on the rear of the tender or tank of the engine to ascertain if the track was clear and give signals to the engineer. An engine such as that one, running as it was, can be stopped, according to the condition of the track, in from one hundred and fifty to three hundred feet, if properly equipped. The engineer, a witness for plaintiff, said that, when just at the end of and coming out of the curve, the fireman saw the speeder ahead on the track and called out to the engineer to whistle. They were then about two car lengths from the speeder. He immediately applied the emergency brakes and brought the engine to a stop within about three hundred feet. Before stopping, the locked wheels slid some distance, and the rear of the engine, being the end of the tank, struck the speeder upon which deceased was riding, knocking him off and inflicting upon him fatal injuries.

The engineer could not see the speeder before the fireman called out, because he was on the left-hand side and in the bend of the curve. The fireman and brakeman for the appellant both state that they did not see the speeder until the moment the fireman called to the engineer. The deceased had his back to the engine.

The evidence is undisputed that the track upon which deceased was riding, which he was inspecting, and upon which he was killed, was appellant's main line track, and although its railroad lies wholly within King county, state of Washington, it was then being used in transporting cars that went out of the state, carrying both intrastate and interstate commerce. The deceased was forty-five years of age at the time of his death, and left surviving him a widow and three minor children, all dependent upon him, but living in Greece.

The case was tried to the court without a jury, and the court, after the conclusion of the testimony, and, as he certifies, "with the consent of and accompanied by both parties hereto and their respective counsel, viewed the premises where the accident occurred and also Columbia & Puget Sound en-

gine No. 5, which ran down the deceased." There were findings and conclusions, and judgment against appellant for damages in the sum of \$3,700, apportioning \$2,835 thereof to the widow, \$115 to a minor daughter, \$350 to one minor son, and \$400 to another minor son.

The complaint charges, in effect, that the appellant was negligent, (1) because it failed to station a man on the rear of the engine to ascertain if the track was clear, and (2) because it failed to exercise reasonable care in the operation of its engine and tender to avoid the collision and consequent injury to the decedent, after the company, its agents and officers, became aware of the presence of the decedent upon its track. The answer pleads assumption of risk and contributory negligence, and denies the allegations of negligence, relationship, and damages, and the further allegation that the things which the decedent was doing were incident and necessary to the carrying on of the business of interstate commerce by appellant, and that the decedent was employed by appellant, aiding and assisting it in carrying on its interstate commerce business.

I. It is contended by appellant that respondent failed to show a cause under the employers' liability act. This contention is without merit. It was alleged in the amended complaint, and not denied in the answer, that appellant was, at the time of the injury, engaged in interstate commerce. It is shown that the injury occurred on its main line railroad track, and that the decedent was engaged in inspecting the condition of this main line railway track to see that no obstructions or defects existed thereon. It is true that the true test for determining whether the employee is engaged in interstate commerce is the nature of the work being done at the time of the injury. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473. In that case the deceased was engaged, at the time he was killed, in switching cars that contained only intrastate freight. A few minutes before that, he had been switching interstate freight. The court held that he was

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not within the act. Other similar cases are cited. In the present case, there could be no possible separation of decedent's inspection of appellant's track for the purpose of its intrastate commerce and of its interstate commerce. The two were obviously concomitant. His inspection was for the purpose of aiding and assisting the appellant in the operation of its trains, cars, and locomotives, and the carrying on of its business, both of interstate and intrastate commerce. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, Ann. Cas. 1914 C. 153.

II. It is insisted that no negligence was proven upon which a finding of the court of negligence on the part of appellant could be based. The first part of this finding is that the company carelessly, wrongfully, and negligently, and without having used due care to station on the rear of the tender of the engine any brakeman or other person for the purpose of ascertaining if the track was clear, backed the tender and engine over the tracks down upon the deceased. A rule of the company, introduced in evidence by respondent, was as follows:

"When a train is pushed by an engine, except when switching and making up trains in yards, a trainman must be stationed on the front of the leading car, with proper signals so as to perceive the first sign of danger and immediately signal the engineer."

Another rule of the company, introduced in evidence, is as follows:

"An engine without cars in service on the road shall be considered a train."

The engine in question was out upon the main line of the railroad, running from one station to another for the purpose of getting freight cars, and had no cars attached and being pushed ahead except its tank or tender car, was running backwards, and was not engaged in switching or making up the trains in yards. Appellant urges that no man was therefore required to be stationed on the end of the en-

gine tender any more than one would be required on the front of it when running forwards on the road, and it was shown, without contradiction, that it was not customary with this and other roads to so station a man when running alone on the road backwards. Even if there were no such rules of the company, respondent argues that the appellant might be liable if it failed to use reasonable care in regard to having a man so stationed (citing *St. Louis, I. M. & S. R. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646; *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. 135, 33 N. E. 403); that it therefore was a question of fact in this case whether or not there was negligence in failing to have a man so stationed, so as to observe and perceive the first sign of any danger or obstruction upon the track.

The testimony of respondent's witnesses was clear and positive that there was nothing to obstruct the view of the fireman of the engine for the thousand feet traversed between the end of the bridge and the point of collision. The engineer himself stated that the weather conditions were such as to permit seeing as far as half a mile. He himself could not see the speeder on which deceased was riding for the reason that he was situated on the outside of the curve as the engine proceeded, but the fireman was sitting on the inside and would thus have a further view. The brakeman, a witness for appellant, testified that he saw the deceased ahead of him for a distance of about three hundred feet; the fireman testified that he saw him one hundred or one hundred and fifty feet, though neither of them disputed the engineer's testimony that neither the brakeman nor the fireman gave the engineer any warning until the engine was about two car lengths, or a little over sixty feet, away from the speeder. As it required about one hundred and fifty feet, according to some witnesses, and about three hundred, according to others, to stop such an engine when running at the rate of twenty miles per hour, it was manifestly then too late to stop in order to avoid a collision. As the evidence was conflicting upon

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this question, the trial court personally viewed the scene of the injury, and the inspection was had in the same engine which killed the deceased. He, therefore, had the opportunity of viewing the exact scene and of being able to ascertain and determine whether or not the deceased could or should have been seen a greater distance than he was before being run down.

The second ground of negligence as found by the trial court was that the appellant failed to exercise reasonable care in the operation of its engine and tender to avoid a collision and consequent injury to the decedent, after the appellant and its officers and employees became, or should have become, aware of the presence and imminent peril of the decedent upon the tracks. Upon this question appellant insists that, while it may be the duty of a fireman to keep a lookout on the track for obstructions, still that is only one of his many duties, and there is nothing in the record to show that this duty is owed to section men. The degree of care to be exercised by him was the most reasonable care under existing conditions. It cannot be said that he was required to look out of his window constantly, for if he did so he would have no time to perform his other duties, such as "coaling, oiling," etc. It is further insisted that the rules placed the burden upon trackmen to keep out of the way of trains, and that trains have a right of way over section men. With all these contentions we must agree.

There were three agents of appellant upon the engine, the engineer, fireman, and brakeman, and while it must be assumed that the engineer could not constantly look ahead for trackmen, nor the fireman, yet the third man—the brakeman—undoubtedly could. If there was any negligence on the engine, it must be imputed to the brakeman. The brakeman was standing in the cab on the fireman's side, looking out of the window in the direction in which the engine was going. He himself states that he saw the deceased three hundred feet before they struck him. If, under the circumstances, he could

see the deceased three hundred feet, it is difficult to understand why he did not see the deceased a greater distance, or approximately the one thousand feet which the testimony shows could be seen ahead on the track from that side, at that time. Even if it were not the duty of the engine crew to station a brakeman or some other man on the end of the tender as a forward lookout, it would seem that the brakeman could have seen the deceased sooner than he did, and that had he done, so, the accident could have been avoided. Or, if the brakeman had warned the engineer immediately upon his seeing the deceased three hundred feet away, the accident might have been avoided. Whether it is negligence or not for the servants of a railroad company to run an engine backwards or push cars ahead of an engine without stationing some one on the tender or foremost car to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances, the act has been held to be negligence as a matter of law. Thus, backing an engine around a curve at a speed prohibited by ordinance, at a time when workmen may be expected to be upon the track, has been held to be negligence as a matter of law. *Little Rock & Ft. Smith R. Co. v. Pankhurst*, 36 Ark. 371; *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391. But in most cases it has been held to be a question of fact to be submitted to the jury. 23 Am. & Eng. Ency. Law (2d ed.), 745, 746. We, therefore, arrive at the conclusion, as a matter of fact, that there was negligence on the part of the servants of the railway company upon the engine in question, in the operation of its engine to avoid a collision and consequent injury to the deceased.

The same finding of the court that finds negligence against appellant concludes with a finding "that deceased used reasonable care and was not himself negligent." This finding is apparently based upon the testimony of the fireman that, when he first saw the deceased, the deceased had stopped the

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speeder and was in the act of getting off. From this it is argued that, upon the first warning, the deceased made immediate efforts to get out of the way of the engine and escape danger. On this it may also be inferred that, had he had warning a moment sooner, he could have avoided the engine. There was a rule of the company as follows:

“No notice will be given of the passage of irregular trains. Track and bridge men will govern themselves accordingly. They must use the utmost caution at all times.”

The operation of railway trains necessitates that other persons employed upon the railway track look out for the safety of the trains and the lives of those on board as well as their own. Trains cannot be stopped suddenly and cannot move aside to avoid hitting a trackman on the track. Of course, those operating the trains, when they discover, or in the proper performance of their duties reasonably should discover, the presence of trackmen on the track, should not carelessly or wilfully run them down, but should adopt reasonable and immediate measures, according to the circumstances, to avoid doing so.

It is evident here that the deceased negligently placed himself in a situation where he could not extricate himself from his peril in time to avoid the tragedy. This constitutes contributory negligence. Contributory negligence, however, is not a bar to recovery under the Federal employers' liability act, if the employer was in the slightest degree negligent. In *Louisville & N. R. Co. v. Wene*, 202 Fed. 887, the United States circuit court of appeals held that, under the act in question, contributory negligence shall not bar recovery, but shall be considered in abatement of recovery in accordance with the degree thereof; the fact that an employee's negligence is equal to or greater than that of the railroad company will not bar a recovery of any damages. In that case the decedent, a conductor of a freight train, was himself guilty of negligence in failing to see that a switch was closed

after his train in order that a following passenger train might pass. As the passenger train approached, however, the engineer, if he had looked, could have discovered that the switch was open, a distance amply sufficient to enable him to stop the train, but he failed to discover the open switch until after he had run into it, and consequently collided with the freight train and caused deceased's death. It was held that the court properly charged that the decedent was guilty of contributory negligence, and that, after the jury had found the amount of damages to which the decedent's next of kin would be entitled in the absence of decedent's contributory negligence, they should abate that sum by the amount they should find represented decedent's proportionate contributory negligence. To the same effect are: *Grand Trunk Western R. Co. v. Lindsay*, 201 Fed. 836, affirmed by the supreme court of the United States in 233 U. S. 42, Ann. Cas. 1914 C. 168; *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114, Ann. Cas. 1914 C. 172; *Pennsylvania Co. v. Cole*, 214 Fed. 948; *New York, C. & St. L. R. Co. v. Niebel*, 214 Fed. 952; *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

In the *Lindsay* case, *supra*, it was held that, under the act, it is only when plaintiff's act is the sole cause, when defendant's act is no part of the causation, that defendant is free from liability. In the *Earnest* case, *supra*, it was held that, under the present act of 1908, Congress intended a recovery in all cases of negligence on the part of defendant no matter what the degree of negligence on the part of plaintiff. In that case it was also said:

"Where the causal negligence is partly attributable to him [plaintiff] and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule"

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In Thornton, Federal Employers' Liability and Safety Appliance Acts (2d ed.), 140, the author says:

"If the plaintiff's negligence was as great as that of the defendant, he recovers one-half of his damages. So he may recover if his negligence was greater than that of the defendant."

See, also, Richey, Federal Employers' Liability Act, p. 39; Roberts, Injuries Interstate Employees, p. 220.

In a recent Oregon case, *Chadwick v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 19, 144 Pac. 1165, the court holds that it is not a question of majority of negligence, but one of proportion. Any negligence of the defendant working injury to the plaintiff would entail some damage. For illustration: If both parties were equally negligent and the damages sustained were \$2,000, the verdict should be for the plaintiff in the sum of \$1,000. The foregoing authorities and some others not here mentioned furnish a reasonable interpretation and construction of liability under the Federal employers' liability act. In the case at bar, the deceased was not absolved from the necessity of using reasonable care proportioned to the dangers incident to his work and the place where he was working. His duty required him to give attention to his work. But the rules of the company required him to look out for regular and irregular trains and use the utmost caution. We cannot say, as a matter of law, how often he should turn from his work to look out for approaching trains. That was a matter, in view of the nature of his employment and his situation, he had to determine for himself. He, it seems to us, proceeded upon his inspection duties without taking sufficient precautions under the rules of the company and according to the dictates of the duty of self-protection, by looking back as well as forward frequently, so as to discover any train approaching from either direction at the earliest possible moment and avoiding any injury if possible. His negligence existed up to the moment when he was observed, or should have been observed, by the men on the engine, if ordinarily careful

in the performance of their duties. By both the company rules and that natural one of self-protection, his duty to look out for trains, both regular and irregular, was the greater. His duty to so watch out was increased when entering a sharp and somewhat obscure curve, and hence his negligence was increased. On the other hand, however, at the moment that he was discovered, or that he should have been discovered, it was the duty of the train men to use every effort to avoid injuring him, consistent with their own safety or that of others. As was said in the *Cole* case, *supra*, by the United States circuit court of appeals:

“As the night was clear and the track straight for a considerable distance, no conclusive reason is suggested for the failure to see the lights, if actually burning, in time to avoid the collision, assuming that the train was running at the limited speed stated and as required by the block signals.”

In *Lynch v. Chicago & A. R. Co.*, 208 Mo. 1, 106 S. W. 68, there was a state of facts very similar to those in the present case. In upholding the judgment against the defendant in that case, the court said:

“But it is insisted that there was absolutely no evidence that the engineer and fireman of the engine actually knew that John Lynch was upon the track ahead of their engine. It is true, as already stated, the day was clear, the track for a distance of from a half to two-thirds of a mile from the west to where the deceased was struck was straight, and the velocipede and the man thereon was an object that could not escape being seen by the engineer and fireman with their faces turned towards the east, the direction in which their engine and tender and the velocipede were traveling at the time. . . . It is also in evidence that, when this engine returned east following the deceased, it was running backwards with the tender in front and it was not only their duty under such circumstances to keep a lookout, but the evidence shows that only a very few minutes before they struck him they were actually looking ahead. From the time they turned the curve east of the coal chute until they struck him, the track was straight and unobstructed, and the day was

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clear and bright and there was absolutely nothing to keep them from seeing an object as large as a velocipede with a man upon it. . . . 'It appearing that the deceased had a right to be where he was on the track, that his life could have been saved by the use of ordinary care by the defendant's servants operating the train, and that they failed to exercise such ordinary care, a demurrer to the evidence was rightfully overruled although there was evidence tending to show that the deceased was guilty of negligence.' "

In *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28, a section hand was engaged in work on the track with his back to the approaching train. He did not see it and was run over. His representative recovered on the theory that the engine crew were negligent in the operation of the engine, as they could have seen the deceased for half a mile before hitting him. To the same effect are: *Louisville & N. R. Co. v. Morris*, 179 Ala. 239, 60 South. 933; *Missouri Pac. R. Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150; *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa 387, 92 N. W. 45; *Egan v. Southern Pac. Co.*, 15 Cal. App. 766, 115 Pac. 939; *St. Louis, I. M. & S. R. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646.

The rule in such cases is well stated in 2 Thompson, Negligence, § 1759:

"Such persons [track walkers, repairers and inspectors], using the hand-cars by the license of the railway company, are lawfully upon the track, and, on principles already considered, the railway company owes them the duty, through the men who are driving its trains, to *keep a lookout* for them and to exercise reasonable care to avoid running over them."

We cannot agree with the trial court that the deceased was free from negligence, but hold that he was guilty of contributory negligence, and his contributory negligence was at least equal to, if not greater than, the negligence of the defendant's engine crew. Under all the circumstances shown in this case, we will simply find that his negligence was equal to the negligence of the appellant.

III. Appellant asserts that the deceased assumed the risk. This contention is based principally upon the rule of the company that section men were to have no notice of trains, regular or irregular, but must use the utmost care for their own safety. It is shown that the deceased had been working on this section for five years and had often made a trip over this section at the same hour. Trains of both appellant company and the Milwaukee railroad were passing this point at all hours of the day and at irregular intervals. This fact was known to the deceased, and it is claimed, therefore, that the approach of a train at any minute was a thing to be expected, and was one of the perils and hazards of his occupation, and was a risk which he assumed. The case of *Cooney v. Great Northern R. Co.*, 9 Wash. 292, 37 Pac. 438, is relied upon. In that case a section man on a speeder was injured in a collision while upon the right of way. It was found that:

“The train with which he came in contact was in plain view for a distance of a mile and a half, and was seen, or could have been seen by him, and if he failed to discover that it had left the station and thereby exposed himself to danger, surely the railroad company ought not to be required to respond in damages for the injuries resulting from his own misjudgment, especially in the absence of proof that the train was *negligently operated*.”

The general rule is stated in 20 Am. & Eng. Ency. Law (2d ed.), 112:

“A servant will be presumed to have notice of and to have assumed the risks incident to all dangers and defects which, to a person of his experience and understanding, are or ought to be patent and obvious.”

Same, p. 123:

“Risks arising out of the negligence of the master, or of one whom the master intrusts with the superintendence of his work, are not risks ordinarily incident to the employment, and are not assumed by the employee.”

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Under the present Federal law, the negligence of a fellow servant is also eliminated as a defense to such an action.

In *Connelley v. Pennsylvania R. Co.*, 201 Fed. 54, 47 L. R. A. (N. S.) 867, the circuit court of appeals, in an action for the negligent killing of a track walker under the Employers' liability act, held that such track walker, "employed to walk over and watch tracks and repair small defects, while there is a constant passing of trains, assumes the risk of injury by being struck by trains *properly operated*, and he must adopt for his self-protection reasonable safeguards" (Syllabus); that,

"Where a railroad operates its trains . . . in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them;" citing a number of cases.

In that case, it was pointed out, however, that the train was as carefully and properly operated as was possible. A train was backing up in a station where there were sixteen tracks, on one of which the deceased was working as a repairer. On the end of the train which struck decedent, a brakeman was stationed to give warning to any one he saw by shouting or working the air whistle. It was shown that he was on watch and had control of the air brake, but owing to the cloud of steam enveloping the decedent from near-by engines, he did not see him until the car was hitting him, when he instantly applied the air.

The deceased assumed the risk of injury from all trains properly operated, but we have seen and found in this case that the engine here in question was improperly operated. The deceased did not assume the risk of engines being run over the road reversed without proper lookout or warning being given to avoid running him down. We cannot agree with the contention that, in such a case, the doctrine of as-

sumption of risk applies. *Pittsburgh, C. C. & St. L. R. Co. v. Rogers, supra.*

IV. Appellant contends, also, that the court erred in its findings when it found that the widow and minor dependents of the deceased were entitled to certain sums in apportioning the judgment. It has been held by the United States supreme court, in *Central Vermont R. Co. v. White*, 238 U. S. 507, that the distribution of the award is of no concern to the defendant. This being the holding of the Federal courts upon a question of Federal legislation, this court is of course bound thereby.

There are some other contentions made by appellant in which we find no merit.

As the case was tried without a jury and is to be tried by this court *de novo* upon the record, we will order a judgment upon the law and the facts in accordance with this opinion. The court below found the entire damages to which respondent was entitled to be \$3,700. This was in accordance with the facts supporting it, and we will not alter it. He found this judgment, however, upon the finding that the deceased was free from negligence and the entire negligence was that of the appellant. This was erroneous, the deceased being equally negligent with the appellant. The respondent is, therefore, entitled to one-half the amount of damages found, or \$1,850. The judgment is, therefore, modified so as to allow the respondent a judgment of \$1,850, apportioned in the same proportion substantially between the surviving widow and the dependent children of deceased as the proportions fixed by the trial court. That is a mere matter of mathematical calculation which can be made by the court below or by the clerk. As so modified, the judgment will stand affirmed.

Appellant will have its costs of appeal.

PARKER, MAIN, and FULLERTON, JJ., concur.

[No. 12397. *En Banc*. February 17, 1916.]

THE STATE OF WASHINGTON, *on the Relation of The Public
Service Commission, Appellant*, v. SKAGIT RIVER
TELEPHONE & TELEGRAPH COMPANY *et al.*,
Respondents.¹

TELEGRAPHS AND TELEPHONES—JOINT RATES — REGULATION — AUTHORITY OF PUBLIC SERVICE COMMISSION. Where two telephone companies are willing to make a physical connection upon terms agreed upon, the public service commission, in ordering the connection, has no power to provide for the cost.

SAME. Under the statute authorizing the public service commission to require a physical connection between telephone companies that have failed to establish joint rates when such joint rates should be established, the commission has no power to establish the rates or tolls until the companies "have failed" to do so after the connection is ordered.

SAME. Likewise, the commission in such a case has no authority in the first instance to make rules or regulations to prevent interference between one of such connected companies and a third company, when using the lines of the other connected company; as such interference must be avoided by mechanical means or operating rules put in force by the companies.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered August 15, 1914, dismissing an action to compel the enforcement of an order of the public service commission requiring physical connection between the lines of telephone companies, after a trial before the court. Reversed.

The Attorney General and *Scott Z. Henderson, Assistant*, for appellant.

Hughes, McMicken, Dovell & Ramsey and *Otto B. Rupp*, (*Pillsbury, Madison & Sutro*, of counsel), for respondents.

ON REHEARING.

HOLCOMB, J.—The original opinion in this case is reported is 85 Wash. 29, 147 Pac. 885, 151 Pac. 1122. On petition

¹Reported in 155 Pac. 144.

for rehearing or for modification by appellant, and for rehearing by respondents, the case has again been heard *En Banc*.

We are still satisfied with the original decision to the effect that, under the law, the commission has power to order the physical connection between the telephone lines of the Independent Company and the Skagit River Company, and the necessity therefor is a question exclusively within the discretion of the commission. But the latter portion of the third conclusion in the decision is erroneous and must be modified.

The fact was overlooked that both companies subject to the order—the Independent and the Skagit River—were and are willing to make the physical connection, and there is no warrant for the direction that the cost thereof, whatever that may be, be provided for by order of the commission. The statute regulating such proceedings also provides that, when such companies “have failed to establish joint rates or charges for service by or over their lines, and that joint rates or charges ought to be established, the commission may, by its order, require such connection to be made.” Under such statutory provision, therefore, the commission has no authority to establish the joint rates or tolls until the companies “have failed” so to do, and it was properly left in the first instance to the companies so to establish joint rates.

Nor has the commission any authority, under the statute, in the first instance to make any rules or regulations to prevent interference between the Independent Company and the Pacific Company when using the lines of the Skagit Company. The Pacific Company has no vested or lawful right to prevent the use of the Skagit Company’s lines by the Independent Company as ordered by the commission, and if such use in any way interferes with the use by the Pacific Company of its lines as connected with the Skagit Company, it must prevent or avoid same by mechanical means or by operating rules put in force by the several companies interested.

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Syllabus.

These modifications result in a complete affirmance of the order of the public service commission, and reversal of the judgment of the superior court. It is so ordered.

MAIN, BAUSMAN, FULLERTON, ELLIS, and PARKER, JJ.,
concur.

[No. 12534. Department Two. February 17, 1916.]

JAMES BEASTON *et al.*, *Respondents*, v. PORTLAND TRUST &
SAVINGS BANK, *Intervener and Appellant*, PAYETTE
TIMBER & MILLING COMPANY, LIMITED, *Defend-*
ant, W. S. T. DERR, *as Clerk of the Superior*
*Court for Clarke County, Garnishee.*¹

WITNESSES—TRANSACTION WITH PERSON SINCE DECEASED—CORPORATION AS PARTY—DECEASED OFFICER. Rem. & Bal. Code, § 1211, excluding the evidence of a party in interest or to the record in his own behalf as to any transaction had by him with a person since deceased, where the adverse party sues or defends as legal representative of such deceased person, does not exclude evidence of transactions had with a stockholder and officer, since deceased, of a corporation which was the adverse party.

SAME—DEPOSITION TAKEN BEFORE DEATH. A deposition as to transactions with an adverse party who died after the deposition was taken but before the trial, is not inadmissible as evidence of a transaction had with a party since deceased, within Rem. & Bal. Code, § 1211; since the evidence was competent at the time the witness testified.

DEPOSITS—SPECIAL DEPOSITS—TITLE. Where defendant, in an action to foreclose logger's liens, procured the release of the logs pending the trial by inducing a bank to make a deposit of a check with the clerk of court pursuant to Rem. & Bal. Code, § 1173, upon the representation that it had a good defense to the action and would return the check to the bank unless it was necessary for the payment of the lien judgments, the deposit was a special one, and not a loan, and did not vest the defendant with any title to the money upon its obtaining judgment defeating the liens.

GARNISHMENT—MONEY SUBJECT—SPECIAL DEPOSIT. A special deposit, made by a bank to enable defendant in a lien foreclosure to

¹Reported in 155 Pac. 162.

procure a release of the logs, is not subject to garnishment by judgment creditors of the defendant, after dismissal of the foreclosure suit, where the defendant had no title to the money.

Appeal from a judgment of the superior court for Clarke county, Holcomb, J., entered August 10, 1914, upon findings in favor of the plaintiffs, in garnishment proceedings, tried to the court. Reversed.

Huntington & Wilson, for appellant.

McMaster, Hall & Drowley, for respondents.

FULLERTON, J.—In the early part of the year 1912, an action was brought by T. C. Stearns and others, as plaintiffs, against the Payette Timber & Milling Company, to foreclose loggers' liens filed by the plaintiffs upon certain logs and timber products owned by the milling company. At the commencement of the action, the court appointed the sheriff of the county wherein the liens were filed as receiver of the property, and possession of the property was duly taken by the sheriff pursuant to such appointment. After the seizure of the property by the sheriff, the milling company sought to secure its release prior to the determination of the question whether the liens of the plaintiffs were valid and subsisting liens thereon, a question on which it had taken issue in the foreclosure action. Pursuant to that purpose, it procured the Portland Trust & Savings Bank to issue its cashier's check, payable to the sheriff holding the property, in an amount equal to the claims sued upon, together with one hundred dollars additional to cover costs and interest. The statute (Rem. & Bal. Code, § 1173; P. C. § 309 § 35) required that the deposit to secure the release of the property be made with the clerk of the court, and the sheriff, after indorsing the check, caused it to be so deposited, whereupon the property was released to the milling company. The clerk, however, did not hold the check, but caused it to be cashed and held the money in its stead. Later on, the issue between

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the lien claimants and the milling company was tried out and resulted in a judgment in favor of the milling company, which was duly entered on June 17, 1912.

On January 24, 1912, the respondents in the present action recovered a judgment against the milling company for \$1,625. Subsequent to the deposit of the money with the clerk in the first action mentioned, but prior to the termination of that action, the respondents caused a writ of garnishment to be issued and served upon the clerk, garnishing all moneys in his possession belonging to the milling company. On September 16, 1912, after the final termination of the lien case and the time limited to appeal therefrom had expired, the judgment creditors caused an execution to issue on the judgment and a second writ of garnishment to be issued and served upon the clerk. In the meantime, the bank named had served a notice upon the clerk to the effect that the money deposited with him in the lien foreclosure proceedings was the money of the bank, and that the bank would look to him for the return of the money, if not applied to the purposes for which it was deposited. The clerk made answer to the garnishment proceedings, setting up the adverse claim made to the money by the bank. The bank also obtained leave of court and filed a complaint of intervention in the proceedings, in which it set up its claim to the money. An answer was filed to the complaint, and on the issues thus framed, the rights of the parties to the money was tried. Judgment was entered against the bank and in favor of the garnishees, and from this judgment, the present appeal is prosecuted.

As a preliminary question, it is necessary to notice an objection made by the respondents to the admissibility of certain evidence offered by the appellant. In the negotiations leading up to the deposit of the money with the clerk of the court, the bank was represented by one Olmstead, its then vice president and manager, and the milling company by one Brainard, its president; each of these persons being at the

time a stockholder in the corporation which he represented. Prior to the trial of the garnishment proceedings, the deposition of Olmstead was taken for use at that trial, as to the understanding had between Brainard and himself concerning the deposit of the money. Between the date of the taking of the deposition and the date of the trial, Brainard died, and when the deposition was offered in evidence, it was objected to on the ground that the witness was incompetent to testify, because of the statute relating to the competency of witnesses when the adverse party sues or defends as the representative of, or as deriving right or title from or through, a deceased person. The trial court admitted the deposition, the respondents claim erroneously, and they urge in this court that it must be rejected here, since this court tries the action *de novo* and must try it upon the competent evidence in the record only. The statute relied upon to exclude the evidence is found at Rem. & Bal. Code, § 1211 (P. C. 81 § 1027). The portion thereof material to the question reads as follows:

“No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years.”

The respondents do not, of course, claim that they are suing or defending as executor or administrator, or as the legal representative of any deceased person, but claim, as we understand them, that they defend as deriving right through

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and from a corporation in which Brainard had an interest; the argument being that, since Brainard was, at the time of making the contract, a stockholder in and president of the milling company, he had a personal interest in the property of that company, and since the claim of the appellant bank to the money in the hands of the clerk affects that property, it affects such interest as Brainard had in the corporation, and to permit Olmstead to testify is to permit a party in interest to testify on his own behalf to a transaction had by him with a deceased person where the adverse party claims by or through such person. But we are constrained to the belief that the contention is not well founded. There are cases which maintain the rule that a stockholder has such an interest in a corporation as to disqualify him from testifying in behalf of the corporation in an action against the representatives of a deceased person, and cases, also, which maintain the converse of the rule, namely, that if the parties be living, one of them will not be permitted to testify to transactions with the other if the agent of that other, who conducted the transactions, be dead.

This latter rule may support the contention of the respondents, but we think the cases upon which it is founded, for the greater part at least, rest upon statutes which can be differentiated from our own, and that they are contrary to the general trend of the cases even upon like statutes. Our statute, it will be observed, applies, in its terms, only in the case of the death of a natural person who is a principal in the contract. It makes no reference to corporations, or to agents of corporations, or even to agents of deceased natural persons, and to read into it this further exception would be, we believe, an unwarranted extension of its terms. The cases cited from other jurisdictions, we shall not review. As we say, they are conflicting. Of the two cases cited from this court, the first is *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124. But a careful reading of the case will show that the exclusion of the evidence there offered was rested

upon different principles from that contended for here; the court expressly saying, that it did "not feel called upon to pass on the question of whether an officer of a corporation can be permitted to testify to a transaction with a deceased person, in a suit between such corporation and the representative of such deceased person." The other case is *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642. In this case the witness excluded stood in the relation of a mortgagee to the property in dispute, which would be affected by the result of the action. Plainly the case is not in point on the question here involved.

We think, further, that the deposition was admissible under the rule of the case of *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697. In that case we held that the death of a party to an action and the substitution of his legal representative, subsequent to the commencement of the action, did not render inadmissible in evidence the deposition of an adverse party in interest, when, at the time such deposition was taken, the witness was competent. This, on the principle that the witness testified when his deposition was taken, not when it was offered to be read in evidence. Such were the facts in the case before us. At the time the deposition of Olmstead was taken, all of the parties to the transaction were alive, and his evidence was then clearly competent, and the statute, to use the language of Judge Anders, "makes the time of testifying the test of competency, rather than the time of the hearing."

Treating the deposition of Olmstead as properly in the record, we think the trial court reached an erroneous conclusion on the facts. Olmstead's testimony makes it clear that the bank did not intend to make a loan of the money to the milling company, or otherwise vest it with title or ownership therein. While the witness realized that the money would be applied to the satisfaction of the claims of the plaintiffs in the lien foreclosure action, should they succeed in establishing their liens, he was led to infer from the state-

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ments of Brainard that there were well grounded reasons for believing that they would not be so successful, and that the money would be returned to the bank within a short time. He also testified that it was understood between himself and Brainard that the check would not be cashed unless necessary for the payment of a judgment obtained by the lien claimants, but would, if not cashed for that purpose, be returned to the bank in its original form. His statements, it seems to us, are supported by the fact that the check was not made payable to Brainard nor the milling company, nor to any one for the milling company, but to the officer who had seized the property. It is true a note was taken from the milling company for the amount of the check, but this the witness explains was a convenient method of keeping an account of the transaction and to represent the obligation in case the proceeds of the check were applied on the liability it was given to indemnify. But, without pursuing the inquiry further, we think it clear that the money was deposited for a special purpose, without intent on the part of the depositor to part with title unless necessary to be used for that special purpose. Were the contract, therefore, between the milling company and the bank, the milling company could not retain the money. The judgment debtors of the milling company by garnishing the money acquired no greater rights in the money than the milling company itself possessed, and, since the latter had no rights, the garnisheeing creditors acquired none. *Bellingham Bay Boom Co. v. Briscois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; *Merwin v. Fowler*, 20 Wash. 587, 56 Pac. 374; *McAlmond v. Berington*, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597. The judgment is reversed, and the cause remanded with instructions to enter a judgment for the appellant intervener.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 12747. Department One. February 17, 1916.]

HARRY L. ROSS *et al.*, Respondents, v. ERICKSON

CONSTRUCTION COMPANY *et al.*, Appellants.¹

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—EFFECT—ABOLITION OF CIVIL ACTIONS—MALPRACTICE IN FURNISHING MEDICAL ATTENDANCE. Under the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, compensating injured workmen in extra-hazardous employments without reference to the manner of the injuries, and declaring that, "all phases of the premises are withdrawn from private controversy," "and to that end all civil actions and civil causes of action for such personal injuries . . . are hereby abolished, except as provided in the act," and providing for readjustment of compensation in case of aggravation of disability, an injured workman compensated by the act cannot maintain an action for malpractice aggravating his injuries, against his master and the physician provided by the master to furnish medical attendance to employees in consideration of monthly deductions from their wages; since the injury by such malpractice is proximately attributable to the original hurt and is received in the course of the employment and so within the benevolent design of the statute providing compensation.

SAME—WORKMEN'S COMPENSATION ACT—POLICE POWER. The admeasurement of damages in money for injuries to employees is within the police power of the state, and the courts will not restrain or enlarge upon the exercise of that power, or substitute its judgment for that of the legislature upon any question of fact arising under it.

SAME—COMPENSATION—EFFECT ON ACCIDENT INSURANCE. The workmen's compensation act providing compensation to injured employees in extra-hazardous employments does not bar a recovery upon an accident policy, since the same rests upon a contract independent of the statute.

Appeal from an order of the superior court for King county, Ronald, J., entered December 5, 1914, granting plaintiffs a new trial, after the verdict of a jury rendered in favor of the plaintiffs, in an action for malpractice. Reversed.

¹Reported in 155 Pac. 153.

NOTE: The case of *Northern Pac. R. Co. v. Meese*, 239 U. S. 614, had not been reported when this opinion was written.—REP.

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Corwin S. Shank, H. C. Belt, and George C. Congdon, for appellants.

*Wilson R. Gay and S. H. Kellera*n, for respondents.

CHADWICK, J.—Plaintiffs brought this action for the recovery of damages alleged to have been suffered by reason of the malpractice of defendant McGillivray. Plaintiff Harry L. Ross was employed by defendant Erickson Construction Company, and was injured in the course of his employment. The accident occurred on the 21st day of December, 1913. Plaintiff was taken to the hospital conducted by McGillivray and remained under his treatment until February 12, 1914.

McGillivray was employed to do the surgical and hospital work for the construction company, and was paid for his services out of a fund made up by deducting the sum of one dollar from the monthly wages of the employees. After leaving the hospital, plaintiff made claim under the industrial insurance law and accepted a final award. This action was thereafter brought against the defendants for the recovery of damages laid in the sum of \$15,000. A trial upon the merits was had, resulting in a verdict for plaintiffs in the sum of one dollar. A new trial was granted upon the grounds of newly discovered evidence. From the order granting a new trial, defendants have appealed.

Appellants set up in their answer, and maintained throughout the trial, that no recovery could be had against either of them, for the reason that respondent Harry L. Ross had been compensated for all injuries resulting from the primary injury, or proximately attributable thereto. This contention is urged on appeal, and our conclusion will make it unnecessary to consider the questions raised by other assignments of error, for if respondents cannot recover at all, other questions become academic.

In discussing the question, we shall consider the state of the law at the time the industrial insurance law was passed (Laws 1911, p. 345; 3 Rem. & Bal. Code, § 6604-1 *et seq.*);

and the industrial insurance law, its objects and purposes, its accomplishments, and its relation to causes of action that had theretofore been considered as independent of the primary cause of action.

At the time the industrial insurance law was passed, one who had been injured by or through the negligence of an employer could maintain an action and recover all damages proximately traceable to the primary negligence. If the master assumed to collect fees out of the wage of the employee for the purpose of maintaining medical and surgical treatment and hospital service, without deriving any profit therefrom, he was bound to exercise due care in providing a proper place for treatment, and in selecting physicians and surgeons. A breach of this duty made him liable in damages for the malpractice of the physician or surgeon. *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235; *Simon v. Hamilton Logging Co.*, 76 Wash. 370, 136 Pac. 361; 3 Wharton & Stille, Medical Jurisprudence, p. 505; 5 Labatt, Master and Servant, p. 6216.

If the master retained a part of the fee for his own use and profit, he became liable as a principal with the physician and surgeon and answerable for his negligence or lack of skill and learning. *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. 880; *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338; 5 Labatt, Master and Servant, p. 6214; 3 Wharton & Stille, Medical Jurisprudence, p. 506; 2 Shearman & Redfield, Negligence, § 331.

If the master did not employ medical and surgical attendance, the one suffering from his negligence could, using ordinary care and diligence only, employ his own physician or surgeon, and if he became the victim of malpractice, he could recover his damages from the master. *Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac. 1081; *Chicago City R. Co. v.*

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Cooney, 196 Ill. 466, 63 N. E. 1029; *City of Dallas v. Meyers* (Tex. Civ. App.), 55 S. W. 742; *Seeton v. Town of Dunbarton*, 73 N. H. 134, 59 Atl. 944; *McGarrahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211, 50 N. E. 610.

One phase of the situation was that the workman might be compelled to try one action to secure compensation for the primary injury and one or more to secure compensation for the secondary wrong; that is, the malpractice of the surgeon.

Another phase, as the legislature notes, was that, "little of the cost of [to] the employer has reached the workman," and his remedies were "uncertain, slow and inadequate." Then, too, the master might have to defend an action predicated upon the primary issue of negligence, and thereafter submit to a second recovery for the final consequences resulting from the malpractice of the physician employed by him. Both master and servant were subject to the burden of protecting and defending rights within bounds limited only by the statute of limitations. Injustice to the laborer and hardships to the industries of the state alike called for some plan that would relieve the servant of the necessity of pursuing his remedy for compensation in the courts, and the master of the harassments, vexations, and uncertainties attending the trial of all cases where men are called upon to defend against the charge of negligence.

The state, in the exercise of its sovereign power, recognized that the welfare of the whole people depends, "upon its industries, and even more upon the welfare of its wage-worker," and accordingly passed a law which was designed to compensate an injured workman without reference to the manner of his injury or the questions of negligence, contributory negligence, assumption of risk, or fellow servant.

The state declared its power in the following comprehensive language:

"The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure

and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." Laws of 1911, p. 345 (3 Rem. & Bal. Code, § 6604-1).

The legislature undertook to withdraw "all phases of the premises from private controversy," and provide "sure and certain relief for workmen," and to that end abolished "all civil actions and civil causes of action for such personal injuries," and abolished all jurisdiction of the courts over such cases, except as in the act provided.

"It [the act] is founded on the basic principle that certain defined industries, called in the act extra hazardous, should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received." *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 175, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

In discussing the economic and sociological features of the law, the court, in the case just cited, noticed the omissions of the common law and the inadequacy of its remedies, and the purpose of the act to provide a remedy that would compensate for all injuries traceable to or incident to the hazards of the industry. The court notes that verdicts, just and unjust, had been rendered in personal injury cases.

"For the greater number of injuries the common law affords no remedy at all. For this unscientific system, it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in

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some degree to the disability suffered." *State ex rel. Davis-Smith Co. v. Clausen, supra*, p. 210.

The purpose to remove "all phases of the premises" from the courts and to put upon the contributing industries the burden of bearing the consequences of all injuries, and to make them bear the burden of caring for the injured man in the condition in which the state finds him, is recognized and emphasized in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915 D. 154. See page 439:

"It is a well accepted rule that remedial statutes, seeking the correction of recognized errors and abuses in introducing some new regulation for the advancement of the public welfare, should be construed with regard to the former law, and the defects or evils sought to be cured, and the remedy provided; that, in so construing such statutes, they should be interpreted liberally, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted, even to the inclusion of cases within the reason, although outside the letter, of the statute. (36 Cyc. 1173)."

See, also, p. 440:

"To say, with appellant, that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only, is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law—that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employee, as distinctive producing causes are lost sight of in the greater vision that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production. The legislature in this act was dealing, not so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought, in the use of language it deemed apt, to embody this

principle into law. That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of § 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.' "

Clearly the purpose of the act was to end all litigation growing out of, incident to, or resulting from the primary injury, and in lieu thereof, give to the workman one recovery in the way of certain compensation, and to make the charge upon the contributing industries alone. That purpose is made reasonably clear by reference to the act.

We find but one right of action reserved to an injured workman. In § 6 (Id., § 6604-6), it is provided that, if injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, his survivors, or dependents shall have a cause of action for any excess of damages over the amount received in the act.

As further confirmation of the theory that the legislature intended to remove the matter of injuries to workmen "in all its phases" from the law courts, it will be noticed (§ 5 h; Id., § 6604-5, and § 12 c; § 6604-12) that the legislature was careful to provide that the compensation allowed may be re-adjusted, "if aggravation . . . of disability takes place or be discovered after the rate of compensation shall have been established, . . ." and if circumstances so warrant, may be increased or rearranged.

We must credit the legislature with knowing the history and the then state of the law as it pertained to recoveries for personal injuries and injuries proximately traceable thereto, and, having such knowledge, with an intent to remove all

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rights and liabilities growing out of, or because of them, whatever their form or number might be. It undertook to, and did, devise a comprehensive scheme as far removed from the domain of legal rights, obligations and duties as they had been defined at common law, as it was possible.

The act is grounded in a humanitarian impulse. It takes account only of the place of injury and the extent of the disability, and compensates for the conditions resulting from the primary injury; or, in other words, it will reject no element of disability if it has accrued in consequence of the first hurt, or as an aggravation arising from any collateral contributing cause.

The legislature knew that workmen had been compelled to meet the defense of nonliability on the part of the employer, who might plead the malpractice of the attending surgeon as a bar to recovery, and if they pursued their remedy against the malpractitioner, they might be subject to the hazard of expert opinion evidence, from which a jury may generally find a sufficient warrant to follow its own inclination. There was no assurance of recovery against either party or against either offender. On the other hand, the employer and faithful and competent physicians and surgeons had been put to the hazard of ill-founded suits. The deserving had gone from the courts, their wrongs unredressed. The undeserving had taken that which, in good conscience, was not their own, and to cure all, the legislature passed the industrial insurance law covering "all phases of the premises."

These things seem clear to us, but it must be admitted that we are exploring a new field, and there is but little to offer to those who find no assurance for their opinions unless something is found to throw upon the shrine of "authority" and "precedent." To all such, we can say no more than that a diligent search has convinced us that there are no cases "in point." But to confirm our conclusion that the consequences of malpractice is an element which will be considered and com-

pensated for by the state, we can offer a few cases bearing slightly.

In *Gregutis v. Waclark Wire Works*, 86 N. J. L. 610, 92 Atl. 354, it was sought to maintain an action under what was there known as the "Death Act" (P. L. 1848, p. 151; 2 Comp. St. 1910, p. 1907). It is an act like Rem. & Bal. Code, § 183 (P. C. 81 § 15), giving a right of action for the wrongful death of a person. The court sustained a demurrer upon the ground that the workmen's compensation act had provided an exclusive remedy. The court said:

"Since that act [the death act] limited the relief granted thereby to recovery in cases where the decedent would, if death had not ensued, been entitled to maintain an action, we must consider whether the plaintiff's intestate, if living, could have maintained an action."

After due consideration and discussion, the workmen's compensation act was held to be exclusive, the conclusion of the court being:

"It will be observed that the workmen's compensation act deals with cases where the injury results in death, and paragraph 8 provides that, where the contract of hiring is subject to section 2 of the act such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in section 2. . . .

"Obviously the remedy thereby provided in case of death, where the contract of the employe is subject to section 2, is inconsistent with the remedy provided by the death act, because the latter provides for a different procedure and a different rule of damages. Since the workmen's compensation act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the death act."

In *In re Brightman*, 220 Mass. 17, 107 N. E. 527, it was held that, where an employee had overexerted himself in saving his effects from a barge which was on fire, thus aggravating a heart disease with fatal results, an award would be upheld. The court evidently considered and rejected the doc-

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trine of intervening agency and aggravation independent of a primary wrong, and looked only to the purpose of the law.

"In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter

"Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act."

So in *In re Sponatski*, 220 Mass. 526, 108 N. E. 466, a workman had been hurt by a splash of molten metal striking him in the eye. While insane as a result of the pain suffered by reason of the injury, he threw himself from a window and was fatally injured. It was held that his widow was entitled to an award; that it was immaterial whether the death was or was not a reasonable and likely consequence, the inquiry relating solely to the chain of physical causation between the injury and the death. We think the importance of the inquiry warrants us in reproducing the holding of the court:

"It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death 'results from the injury' When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death."

In *Burns' Case*, 218 Mass. 8, 105 N. E. 601, the immediate cause of death was bed sores which finally produced blood poisoning. A finding that death resulted from the injury

was upheld. The court quoted from *McDonald v. Snelling*, 14 Allen 290, 296, 92 Am. Dec. 768:

“The mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result that might reasonably have been foreseen as probable, the legal liability continues.’ Nor would it have been material, if that had been found to be the fact, that the bed sore was due to the mistake or the negligence of the physicians acting honestly.”

An award was upheld in *Beadle v. Milton*, 5 W. C. C. 55. It was there complained that the workman had been the victim of malpractice. Although it was found that the treatment was not defective, it was said:

“Assuming it to have been defective, I hold that it would have been no defence to this application, inasmuch as the applicant had done all he could in going to the hospital and submitting to the treatment administered there, independently of his having gone there at the desire and with the privity and consent of the respondents.”

In *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 453, 140 Pac. 685, the law is broadly stated to be:

“If a person receives an injury through the negligent act of another, and the injury is afterwards aggravated, and a recovery retarded through some accident not the result of want of ordinary care on the part of the injured person, he may recover for the entire injury sustained, as the law regards the probability of such aggravation as a sequence and natural result likely to flow from the original injury.”

In *Brown v. Kent*, 6 Butterworths’ W. C. C. 745, a workman who had been injured in the knee, necessitating an operation, was stricken with scarlet fever contracted in the hos-

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pital. The contracted disease settled in the knee joint, making an injury that otherwise would have been of no consequence a permanent disability. It was held that the workman was entitled to compensation. The judges quoted from *Dunham v. Clare* (1902), 2 K. B. 292, 4 W. C. C. 102, as follows:

"The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes, and a new one is substituted for it, that is a new act, which gives a fresh origin to the after consequences."

And thus observed:

"It may well be that the fever, and the condition of the patient caused by it, much increased the risk of the formation of pus, but it was the old wound which was giving the trouble—the old wound which was suppurating. It was the evidence of Dr. Bone, accepted and agreed to by both parties, that if there had not been any accident and consequent injury to the knee, the scarlet fever could not have caused the injury or the incapacity in question. The result is necessarily that the incapacity is the result of the accident to the knee, although probably aggravated by the scarlet fever. This entitles the workman to compensation for the accident on the footing that the incapacity caused by it is continuing."

Other cases of the kind referred to are collected in 8 Neg. & C. C. Cases, p. 1025, and 6 Neg. & C. C. Cases, p. 624. These holdings are consonant with the reasoning of this court in the case of *Zappala v. Industrial Insurance Commission*, 82 Wash. 314, 144 Pac. 54, and cases cited therein.

It would seem that, having an original right to recover against the master for the consequences of malpractice, and a present right to submit his condition for appraisal notwithstanding such malpractice, the respondents fall within the statute. It does not merely deny a right of action, but abolishes all civil actions and all civil causes of action to

which he might have resorted, as well as the jurisdiction of the courts to entertain such causes.

But it is said that a holding that the master and the surgeon are not liable to answer for an aggravated condition resulting from the ill treatment of a wound, or the malpractice of a surgeon, may result in greivous wrong in that only a partial recovery may be had.

What is or what is not a full recovery in a given case is a relative question with which we have nothing to do. It is enough that the legislature has fixed a schedule of recoveries within which the discretion of the commissioners may move, subject to a "court review" as provided in the act, and in lieu of a system that often brought a full recovery in unmeritorious cases and as often no recovery at all in meritorious cases; it has substituted a system that will insure an award in all cases.

It may be asserted, without doing violence to the rules of logic or of law, that whatever sum is fixed for partial or total disability is theoretically the exact sum necessary to measure and compensate the wrong. The logic of our former decision in *State ex rel. Davis-Smith Co. v. Clausen, supra*, is that the admeasurement of damages in money for injuries to employees is within the police power of the state, and it is axiomatic that the courts will not restrain or enlarge upon the exercise of that power. Nor will it substitute its judgment for that of the legislature upon any question of fact arising under it. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645.

Counsel put this case to us: Suppose a workman has his finger crushed; a slight wound which if permitted to heal or if properly treated would result in no evil consequences. He is sent to a hospital and blood poison results by reason of negligent and unskillful treatment, and his arm is amputated that his life may be saved. Can it be said that the legislature intended to deny a recovery for such malpractice,

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it being an injury entirely independent of the injury suffered in his employment.

We have passed the question of allowance and the amount of compensation and will concern ourselves only with the question submitted. Counsel reason from a wrong premise. The resultant injury or "aggravation," to use the words of the statute, is not an independent injury. It is proximate to the original hurt and is measured as such.

Surgical treatment is an incident to every case of injury or accident and is covered as a part of the subject treated. By the law, the commission is given authority, § 24 (Id., § 6604-24), subd. 4, to "supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome." When a workman is hurt and removed to a hospital or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment and a charge upon the industry, and so continues as long as his disability continues.

The law is grounded upon the theory of insurance against the consequence of accidents. The question is not whether an injured workman can recover against any particular person, but rather is his condition so directly or proximately attributable to his employment as to invoke the benevolent design of the state.

In construing statutes, courts have always looked to possible consequences as an efficient aid in clearing doubts. It surely was not the intention of the legislature to leave it to the commission to apportion the compensation allowed by the state with some fancied judgment that might be rendered in a potential suit brought against the attending physician, or to encourage a settlement for a lesser sum than the amount really due by holding out the hope or suggestion that the claimant had a cause of action against a surgeon.

Counsel insist that our conclusion will lead to absurd consequences; that we must thereafter hold that an injured

workman who has had compensation has no right to sue for any tort, and that no person is liable to him for a tort committed during the time of disability; that he can be wounded and injured at will, provided the injury is confined to the original hurt.

We do not so read the statute. It is only such results as are proximately traceable to the original hurt that are within the contemplation of the statute. An independent cause, that in no way proximates the act out of which the right to compensation flows, might afford a ground of recovery, and might not be considered an "aggravation" warranting an increase of compensation within the meaning of the act. We will meet these questions when a state of facts is presented which will call for their solution.

Nor will our holding bar a right to recover upon an accident policy as is suggested. That right rests upon a contract which is independent of the subject treated by the statute, and with parties with whom it has no concern.

The respondent has no cause of action. The case is reversed, and remanded with directions to dismiss.

MORRIS, C. J., FULLERTON, and MOUNT, JJ., concur.

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[No. 12788. Department Two. February 17, 1916.]

BOYD HAMILTON, *Appellant*, v. JAMES S. RAMAGE,
Respondent.¹

BILLS AND NOTES—CONSIDERATION—PARTIAL FAILURE—EVIDENCE. In an action on a note, a partial failure of consideration, as a defense *pro tanto*, is established, where the payee was unable to perform its contract to furnish the maker a quantity of cement, to be measured by market value, which exceeded the amount due on the note.

SAME—ASSIGNMENT—NOTICE OF DEFENSES. Partial failure of consideration is a good defense to a note in the hands of an assignee who took with full notice of the infirmity.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 7, 1914, upon findings in favor of the defendant, in an action upon a promissory note, tried to the court. Affirmed.

F. R. Monfort and Lawrence Jack, for appellant.

A. E. Barnes, for respondent.

PARKER, J.—The plaintiff, Boyd Hamilton, commenced this action in the superior court for Spokane county, to recover upon a promissory note executed and delivered by the defendant James S. Ramage to Orofino Portland Cement Company, which note was thereafter, before maturity, assigned by that company to the plaintiff as collateral security for a loan. One of the defenses made against the note was failure of consideration, which it is alleged was known to the plaintiff at the time he acquired the note from the company. The other defense need not be here noticed. Trial before the court without a jury resulted in findings and judgment in favor of the defendant and for cancellation of the note, from which the plaintiff has appealed.

On September 30, 1913, respondent paid to Orofino Portland Cement Company the sum of \$500 in money, and at the

¹Reported in 155 Pac. 151.

same time executed and gave to that company his two promissory notes for the sum of \$1,650 each, payable, respectively, two and four months after date. This action is upon the note maturing four months after date, the other note having been paid at or near its maturity. The consideration for the payment of this money and the giving of these notes to the company is evidenced by a written contract entered into on the same date between appellant and the company, by the terms of which contract respondent was to receive, in consideration of the payment of the \$500 and the giving of the two notes, the following: (1) He was to receive from the company its mortgage bonds of the face value of \$3,800, being a portion of a series of mortgage bonds issued by the company and secured by a mortgage upon its properties, of which there were then outstanding approximately \$170,000. (2) He was to receive thirty-eight shares, of the par value of \$100 each, of the capital stock of the company, fully paid up and nonassessable. (3) He was to receive, upon completion of the company's cement plant and its going into operation, a quantity of cement of a specified quality, equal to \$3,800 worth, to be measured by market value f. o. b. at the company's plant, without cost to him.

These three items; to wit, the bonds, the stock and the cement, constituted substantially all of the consideration to be given for the execution of the notes and the payment of the \$500 by respondent. Neither the bonds nor the certificates evidencing the thirty-eight shares of stock were delivered to respondent, but were held by the company to be delivered to him upon payment of the notes. For present purposes, however, we may regard the title of the bonds and of the stock as passing to respondent upon execution and delivery of the notes and payment of the \$500, though we do not so decide as a matter of law. At the time of the giving of these notes and the making of this contract, the company had not constructed its plant. At that time its officers made representations to respondent leading him to believe

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that its plant had been financed and would be constructed within a reasonable time, when it would be able to furnish the cement as agreed in the contract. Touching the failure of the company to furnish the cement and its inability to do so in the future, the trial court found as follows:

"The court finds that the Orofino Portland Cement Company has not been able to finance said project; has never erected the plant for the manufacture of Portland cement; that it has no funds with which to erect said plant, and that one unit of such a plant would cost about \$350,000, and that said Orofino Portland Cement Company is unable to carry out the contract which it made to secure the subscription to \$3,800 of its bonds as hereinbefore set out and that said Orofino Portland Cement Company has not paid and is not able to pay any consideration whatsoever for said note."

The trial court also found that appellant, when he acquired the note here involved, had full knowledge of the contract existing between the company and respondent evidencing the consideration for which the note was given, and also had full knowledge of the fact that such consideration had failed. Appellant has been the president of the company, in charge of its business, since prior to the date of the giving of these notes and the entering into this contract by the company with the respondent.

The theory of the trial court in disposing of the cause in respondent's favor seems to be that there was an entire failure of consideration as to both notes and for the \$500 cash payment made by respondent. We do not find it necessary to go to this length in affirming the judgment, but we do agree with the trial court to the extent that there was a partial failure of consideration, at least equal to the amount of this note. It is plain that the bonds are in no event worth more than their face value. Indeed, the terms of the contract and the evidence touching the financial condition of the company argue very strongly that the bonds are not worth their face value, which fact was understood and recognized by the parties to the contract. As to the stock, it is equally

apparent that it has nothing more than a speculative value, has no market value, and that the parties so regarded its value. The cement to be furnished respondent as a part of the consideration was, by the express terms of the contract, to be of the market value of \$3,800. It seems plain then that the consideration failed in so far as the furnishing of the cement is concerned, at least to the extent of the amount of the note here sued upon.

In *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469, 53 Pac. 724, the doctrine of partial failure of consideration being a defense *pro tanto* was recognized by this court. At page 471, the court quotes with approval from 4 Am. & Eng. Ency. Law (2d ed.), 195, as follows:

“Though some of the earlier cases denied the doctrine, there is now no question, in the light of recent decisions, that a partial failure of consideration is a defense *pro tanto* when such failure is liquidated in amount, or can be definitely ascertained by computation.”

That was before the passage of the negotiable instrument statute, which seems to state even a more liberal view of such defense as follows:

“Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.” Laws of 1899, p. 346, § 28; Rem. & Bal. Code, § 3419 (P. C. 357 § 55).

See, also, 3 R. C. L. 945.

It seems plain to us that whatever difficulty there might be in computing with exactness the proportionate extent of the failure of consideration in this case, such failure, in any event, exceeds any amount which would be due upon the note here sued upon. It follows that respondent has successfully maintained his defense of failure of consideration, at least to that extent.

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Syllabus.

It also seems quite plain to us that this defense was maintainable by respondent as against appellant the same as he could have maintained it against the company, the original payee of the note, since appellant acquired the note with full knowledge of this infirmity. *Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846.

The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12827. Department One. February 17, 1916.]

FLORENCE E. STEPHENSON, *Administratrix, Respondent*, v.
BERT PARTON *et al.*, *Appellants*.¹

HIGHWAYS—USE FOR TRAVEL—NEGLIGENCE. It is negligence to drive an automobile against a man standing in the highway beside his wagon, the view being unobstructed and there being ample level space in the traveled road to avoid hitting him.

SAME—INSTRUCTIONS. An instruction to that effect is not erroneous as placing the whole burden on the defendant without reference to contributory negligence; since it was the driver's duty to avoid hitting him.

SAME—INSTRUCTIONS—NEGLIGENCE. In an action for the wrongful death of a person struck by an automobile, an instruction to the effect that, if the deceased had turned from his vehicle, was going away from it, and was run into without negligence on his part, and if his injury was the result of carelessness or negligence on the part of the defendant, the plaintiff could recover, is correct.

SAME—INSTRUCTIONS—LAST CLEAR CHANCE. In an action for the wrongful death of a person struck by an automobile while standing in the street beside his vehicle, or stepping away from the same, where he was seen by the driver two hundred or three hundred yards away, an instruction upon the doctrine of last clear chance is not reversible error.

APPEAL—HARMLESS ERROR—VERDICT. In an action for wrongful death, the defendant is not prejudiced by allowing the jury to segregate the damages and bring in separate verdicts for the different beneficiaries, where it is not claimed that the total amount of the judgment is excessive.

¹Reported in 155 Pac. 147.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 17, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Englehart & Rigg, for appellants.

George B. Holden, for respondent.

MOUNT, J.—On June 25, 1914, Oliver P. Stephenson was run over and killed by an automobile being driven by Miss Ruth Parton. This action was brought by the administratrix of his estate. She alleged negligence on the part of the defendants, and prayed for damages in the sum of \$9,000 for the widow; \$1,500 for a married daughter of the age of 22 years; \$2,000 for a minor daughter 16 years of age; and \$2,500 for a daughter 13 years old.

The defendants, for answer to the complaint, denied the material allegations thereof, and set up the defense of contributory negligence on the part of the deceased. The case went to trial upon these issues. The defendants, at the close of the plaintiff's evidence, moved for a directed verdict. At the close of all the evidence, the motion for a directed verdict was renewed. These motions were denied. The jury returned a verdict in favor of the plaintiff as follows: To the widow, Florence E. Stephenson, \$2,000; to the daughter Myrtle Stephenson, \$700; and to the daughter Ethel Stephenson, \$800. The court instructed the jury that they could not find any damages for the married daughter.

After verdict, a motion was made for judgment notwithstanding the verdict, and for a new trial. These motions were denied, and a judgment was entered in accordance with the verdict. The defendants have appealed from that judgment.

It is urged, first, that the court erred in denying the motions for a directed verdict, and the motion for judgment *non obstante*. The facts are substantially as follows: On

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the day named, the deceased was a mail carrier, carrying mail between White Swan and North Yakima, in Yakima county. At about noon of that day, when he was driving a light wagon to which was attached a team of horses and carrying one passenger, he reached the main road leading into North Yakima, a few miles therefrom. He stopped his team and wagon on the left-hand side of the road. The road at this point was a graveled turnpike seventeen feet in width. Running parallel with this graveled road and to the right of it, was a common dirt road about five feet wide. This dirt road was about two feet lower than the main traveled graveled road. Between the dirt road and the graveled road there was a strip of weeds or small sage brush and gravel. This strip was about four feet wide and inclined to the dirt road; so that vehicles were readily driven from one road onto the other.

Mr. Stephenson, after stopping his hack at the left-hand side of the graveled road, left the passenger holding the team while he had a conversation with a man who was working upon the road. He then returned to the back part of his wagon and was drawing a rope therefrom, at the hind wheel and on the right-hand side of the wagon. He was standing about the center of the graveled road. Ahead of Mr. Stephenson's wagon and on the left thereof, and outside of the graveled road, was a buggy standing, with a horse tied behind it.

While Mr. Stephenson was at the back of his wagon taking the rope therefrom, Miss Parton came up driving an automobile in the same direction Mr. Stephenson's team was headed. When two or three hundred yards away, she saw him and signaled with her automobile horn. Stephenson glanced in that direction but continued to take the rope from his wagon. Miss Parton drove up to him and, the witnesses for the plaintiff testified, struck him with the front of her automobile, knocked him down, dragged him a few feet, and stopped her automobile before the hind wheel thereof ran

over him. The day was clear and bright. The surface of the road was level and smooth, and there was no one else in the road, and nothing to obstruct the view in either direction for several hundred yards.

There is some evidence in the record to the effect that Miss Parton, after she blew the horn of her automobile, did not see the deceased until she was upon him. The defense was that, when Miss Parton drove up near to where Mr. Stephenson was standing, he turned and stepped a few steps in front of the automobile, and that in doing so, Miss Parton could not escape striking him.

It is first argued by the appellants that there was no evidence of negligence on the part of Miss Parton; and second, that the evidence shows contributory negligence on the part of the deceased. If the facts are as stated by the respondent's witnesses, that Mr. Stephenson was standing on the right side of his wagon drawing a rope therefrom, it was clearly the duty of Miss Parton, who was passing him in that position, to avoid him. The evidence shows that there was ample room in which to avoid him. It is negligence to run upon a man who is standing in the highway surrounded by the circumstances here related. While it is no doubt true that a person in a highway must use care, yet when one is rightfully in the highway, and standing there, another person certainly cannot run him down without being guilty of negligence. If, as is contended by the appellants, the deceased was in a place of safety, and stepped in front of the automobile where there was no chance to avoid being struck, the deceased was guilty of negligence. These questions, under the evidence, were clearly questions for the jury. We are satisfied that the court did not err, therefore, in refusing to direct a verdict in favor of the defendants, nor in refusing to grant a judgment notwithstanding the verdict.

Upon the trial, the court instructed the jury as follows:

"If you find that the deceased, Oliver P. Stephenson, at the time and place alleged in the complaint, was standing by

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his vehicle in the public highway in the act of taking a rope therefrom in full view of the defendant, Ruth Parton, and while so standing, without changing his position, said Ruth Parton negligently and carelessly drove the automobile, or negligently and carelessly permitted it to run against him, without exercising reasonable care to avoid him, and thereby caused injuries from which he died, she would be guilty of negligence, and the plaintiff would be entitled to a verdict. In this connection I also instruct you that even though you may not be convinced from the evidence that the deceased sustained the injuries from which he died in the manner alleged and set forth in the complaint, but are convinced that the deceased had turned from his vehicle and was in the act of going away from it, and was run into by said automobile without negligence on his part, as I will hereafter refer to, and that his being run into by said automobile was the result of carelessness and negligence upon the part of the defendant, Ruth Parton, the plaintiff would nevertheless be entitled to a verdict."

It is argued by the appellants that the first part of this instruction was erroneous because it placed the entire burden of avoiding the accident on Miss Parton, and exonerated Stephenson from using any care to avoid the collision with the automobile. There is no merit in this contention, because it is plain that, if Mr. Stephenson was standing in the highway, it was the duty of Miss Parton, having abundant room to do so, to avoid striking him. It is plain that, if these were the facts, Miss Parton was negligent. The rule is laid down in 2 R. C. L., p. 1184, as follows:

"If a person is standing in the highway, a driver must notice him and take care not to injure him, and a failure to see a pedestrian in the street may amount to negligence."

In *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341, we said:

"The footman may rely on the presumption that, so long as he occupies one place or pursues a given course, he need not be run into, and to fail to keep a lookout for the ap-

proach of such vehicles is not necessarily want of care. The degree of care required of such a person of course varies with the circumstances. It depends largely upon place and upon the condition of the street; whether the street is crowded with traffic or comparatively free therefrom; whether he enters the street at a place usually used by travelers on foot, and perhaps on many other conditions; but the degree of care required is ordinary care under the circumstances; and this as we say may be vastly different from ordinary care with reference to crossing fixed tracks upon which railway or street cars are operated."

It follows that, if the deceased was standing in the road attending to his business, it was clearly the duty of Miss Parton to avoid him in passing with her automobile, especially where there was ample room for so doing.

It is next argued that the second part of the instruction is confusing because it in effect tells the jury that if the deceased met his death while walking away from his hack, and was run into by the automobile, still the jury must return a verdict for the plaintiff. The instruction, we think, does not go to that extent. It simply tells the jury that if they find that the deceased turned from his vehicle, was going away from it, and was run into without negligence on his part, and that his injury was the result of carelessness and negligence on the part of the defendant Ruth Parton, the plaintiff would nevertheless be entitled to recover. We think this instruction was correct, and not confusing.

The court also gave the following instruction:

"In connection with the alleged negligence upon the part of the deceased and upon the part of the defendant, Ruth Parton, there is another rule of law which has a two-fold application, commonly known as the doctrine of 'last clear chance.' In the application of this doctrine I instruct you that if you believe from the evidence that the deceased, Oliver P. Stephenson, was negligent in failing to see the approaching automobile and move out of the way so that it could pass in safety, or negligently attempted to cross the

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road in front of the oncoming automobile, such negligence on his part would not defeat the plaintiff's right to recover, if the said Ruth Parton in driving said automobile actually saw that he was in danger and should have appreciated the fact that he was in danger, if you so find, in time to have avoided running into him, by the exercise of reasonable care and negligently failed to exercise such care. The other application of the doctrine is that if you believe that the deceased, Oliver P. Stephenson, was negligent in failing to see the approaching automobile and move out of the way so that it could pass in safety, or negligently attempted to cross the road in front of the oncoming automobile, and if you believe that his negligence had, prior to the instant of injury, terminated or culminated by placing him in a situation of danger such that the exercise of ordinary care on his part alone would not thereafter have avoided the injury without the co-operation of ordinary care on the part of said Ruth Parton, and that she, by keeping a reasonably vigilant lookout, could have seen and appreciated the exposed condition of the deceased in time to have avoided the injury, by the exercise of reasonable care, and negligently failed to keep such lookout or to exercise such care, then the deceased's prior negligence would not bar the plaintiff's right of recovery."

It is argued by the appellants that this instruction was erroneous and not justified by the evidence in the case; and it is contended that the doctrine does not apply where both parties are equally guilty of concurring acts of negligence, each of which, at the very time when the injury occurred, contributed to it. This no doubt is the rule. Under the facts as detailed by the witnesses on behalf of the plaintiff, there would be no room for the doctrine of last clear chance. But the evidence on the part of the defendants tended to show that, while Miss Parton was approaching the deceased, she did not see him from the time she blew her horn, a distance of two or three hundred yards, until she was upon him; that when she came too near him to stop her machine, he stepped in front of the machine, and was thereby injured.

While there may be some doubt as to the application of the rule of last clear chance in this case, we think the instruction

complies with the rule as stated in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941. It is apparent that the trial court attempted to comply with the rule stated in that case. In *Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499, we said:

“If the respondent was proceeding in a way that would have indicated to a reasonably prudent man that he was unconscious of the approach of the taxicab, and the driver saw him, or in the exercise of reasonable care ought to have seen him, and observed his state of mind and discovered his peril in time to avoid striking him, and failed in this duty, he was guilty of negligence and his negligence was the proximate cause of the injury; while the negligence of respondent, if any, was a remote cause.”

In this case it was clearly the duty of Miss Parton to look where she was going, especially where she was about to pass some one who was in the highway, and to avoid him. We think the instruction was not misleading, nor sufficient to warrant a reversal of the case.

It is complained lastly that the court erred in permitting the jury to segregate the damages to the widow and the two minor daughters of the deceased. The jury returned a verdict in favor of the widow in the sum of \$2,000, in favor of the minor daughters, one for \$700, and the other \$800. This court has held in *Koloff v. Chicago, Milwaukee & Puget Sound R. Co.*, 71 Wash. 543, 129 Pac. 398, that an action of this kind is not for the benefit of the estate, but is for the benefit of the widow and children, who would share jointly in any damages recovered. It is not claimed by the appellants that the total amount of the judgment, \$3,500, is excessive. But they do claim that, in allowing the jury to segregate the damages, the effect was to enhance the damages, to their prejudice, by permitting the jury to bring in three verdicts instead of one. But where no claim is made that the total damages are excessive, we cannot understand how the appellants are injured thereby. While we do not desire to ap-

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prove the practice, we think there is not sufficient in this to warrant a reversal.

The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, FULLERTON, and ELLIS, JJ.,
concur.

[No. 13051. Department One. February 17, 1916.]

ROBERT HOFFMAN, *Respondent*, v. I. R. WATKINS,
Appellant.¹

PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for malpractice, the question of negligence in failing to discover a dislocation of the shoulder is a question for the jury, where the testimony as to the making of any of the usual tests was conflicting, experts agreed that failure to do so would be failure to exercise ordinary care and skill, any subsequent injury was denied, and medical witnesses testified that the dislocation found later was of such long standing as to show that it existed when the defendants first treated the plaintiff and failed to discover it.

APPEAL—DECISION—LAW OF CASE. A decision on a prior appeal that substantially the same evidence was sufficient, becomes the law of the case.

PHYSICIANS AND SURGEONS—MALPRACTICE—ISSUES—INSTRUCTIONS. In an action for malpractice in failing to discover a dislocation of the shoulder, where the sole issue was whether the defendant had applied the concededly necessary tests which he claimed to have applied, a requested instruction to the effect that the jury must be governed solely by the testimony of experts skilled in the practice of medicine in determining the question of defendant's lack of due care, is properly refused.

SAME. In such a case, it is proper to submit such issue with an instruction that the experts agreed as to the proper tests to be made and that the defendant claimed to have made the same, such being the undisputed facts.

SAME—MALPRACTICE—DAMAGES—EXCESSIVE VERDICT. A verdict for \$4,000 for malpractice in failing to discover and reduce a dislocation of the shoulder is excessive, and should be reduced to \$2,400,

¹Reported in 155 Pac. 159.

where it appears that the dislocation was subsequently reduced and the permanent effects do not materially diminish plaintiff's earning capacity.

Appeal from a judgment of the superior court for Chehalis county, Claypool, J., entered November 14, 1914, upon the verdict of a jury rendered in favor of the plaintiff for \$4,000, in an action for malpractice. Reversed, unless \$1,600 is remitted.

John C. Hogan and J. B. Bridges, for appellant.

A. Emerson Cross and Hugo Metzler, for respondent.

ELLIS, J.—Action to recover damages for alleged malpractice of a physician in the treatment of an injured shoulder. On a former appeal, Department Two of this court reversed a judgment for plaintiff and remanded the case for a new trial. *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664.

At both trials it appeared that, on Sunday night, February 3, 1912, plaintiff, a man fifty-four years old, was assaulted on the streets of Aberdeen, knocked down, and stunned and robbed, sustaining a cut over the eye and a severe injury to the right shoulder. At both trials the gravamen of the charge of negligence was the failure of defendant to diagnose the injury to the shoulder as a dislocation. On the next morning after the injury, one Dr. Riley called, treated the cut over the eye, and diagnosed the injury to the shoulder as a sprain. On that same or the next evening, defendant called and also diagnosed the injury as a sprain. Two or three days afterwards, plaintiff visited defendant's office, where defendant claims he again examined the shoulder and found it merely sprained. Each of these physicians testified that he examined the shoulder for a dislocation by inserting the fingers in the arm pit, and also by placing the right hand of the patient on the opposite shoulder with the elbow pressed against the side or chest, and that, by these tests, it was de-

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terminated absolutely that there was no dislocation. These two, and every other physician who testified, stated that these are infallible tests for any kind of dislocation of the shoulder, and that, when the hand and elbow can be so placed, the conclusion is invariable and absolute that there is no dislocation, but that if this cannot be done, the contrary conclusion is just as absolute. Dr. Bowlby, a dentist who occupied an office adjoining that of Dr. Riley, testified that he assisted the latter at one time in making this test.

The testimony on behalf of plaintiff tended to show that neither Dr. Riley nor the defendant applied this or any other test or attempted to lift, move or manipulate the arm in any way. Plaintiff followed defendant's directions for about four weeks, during a part of which time and thereafter for three weeks more, he took electrical treatment from Dr. Riley. He claims that the shoulder steadily grew worse and finally, on March 25th, he went to Dr. Randolph of the Aberdeen General Hospital, who with his assistant, Dr. Austin, examined the shoulder, applied the above mentioned tests, measured the two shoulders, found that the injured shoulder was lower than the other, and that the plaintiff was suffering from a subglenoid or downward dislocation of the shoulder. The patient was placed under an anaesthetic and the shoulder was subjected to severe manipulation in an effort to reduce the dislocation, but without success. Owing to the long standing of this dislocation, the head of the humerus had become attached to the bone below the socket by a fibrous growth, and certain muscles had become so shortened as to prevent a reduction without an incisive operation. This was deemed immediately inadvisable because of soreness and swelling induced by the manipulations. Moreover, the patient would not at first consent to it. Finally, on April 25th, the operation was performed by Drs. Randolph and Austin. They made an incision at the top of the shoulder, split the muscles longitudinally, severed certain minor muscles, cut the fibrous growth and set the head of the humerus in the

socket. The plaintiff has so far recovered that he can raise the arm to a level with his shoulder, but cannot do work requiring a higher movement. There was evidence tending to show that this condition will be permanent.

At the first trial, an effort was made to show that the dislocation was caused by the manipulations of Drs. Randolph and Austin on March 25th. That position was entirely abandoned on the second trial. In its stead an affidavit of one Boetcher, a son-in-law of plaintiff, which was admitted as evidence to avoid a continuance, was read. It stated, in substance, that on a night early in March, 1912, plaintiff's wife went out for the evening leaving Boetcher at the house with the children; that he heard a noise as of some one falling; that he went to the door, found the plaintiff lying on the ground drunk to unconsciousness; that he brought plaintiff in, placed him in a chair and went back to bed; that shortly afterwards plaintiff's wife came home and he heard her scolding while putting plaintiff to bed; that the next morning plaintiff remembered nothing of the occurrence, but complained that he had hurt his sore shoulder. Plaintiff's wife positively denied that she at any time ever went away in the evening leaving Boetcher in the house and denied the above incident *in toto*. Both plaintiff and his wife testified positively that he had never received any injury to the shoulder between the time of the assault and his first visit to Dr. Randolph. The reception of Boetcher's affidavit and Dr. Bowlby's testimony, and the elimination of the testimony touching defendant's contract with the lumber company, referred to in the first opinion, and the testimony tending to show that the shoulder might have been dislocated by the manipulations of Drs. Randolph and Austin on March 25th, present the only substantial differences in the testimony adduced at the second trial from that adduced at the first. The trial resulted in a verdict and judgment for the plaintiff for \$4,000. Defendant appeals.

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It is asserted that there was not only an entire lack of evidence to support a finding that there was any dislocation of the shoulder during any of the time while respondent was under appellant's treatment, but that the evidence affirmatively showed that there was no dislocation during that time. The latter assertion is based solely upon the testimony of Drs. Riley and Watkins and the dentist Bowlby that the above mentioned infallible tests were applied and demonstrated that there was no dislocation. It overlooks the fact that the testimony on behalf of the respondent tended to negative the claim that the tests were in fact at any time applied, or that anything more than a perfunctory examination of the arm and shoulder was at any time attempted. The first assertion is based upon the theory that the undisputed evidence of the dislocation found on March 25th was no evidence that there was a dislocation on February 3d. Standing alone this, of course, would be true, but when considered in connection with the evidence of a sufficient cause of the dislocation on February 3d, and the testimony of both the respondent and his wife that the shoulder had suffered no injury in the meantime, and the testimony of Dr. Randolph indicating that the dislocation was one of several weeks' and possibly two or three months' standing, the condition of the shoulder on March 25th became clearly competent evidence for the consideration of the jury as tending to establish a dislocation at the time of appellant's first examination of the arm. The question is not one of presumption, but proof of a condition, coupled with evidence negating any other hypothesis than that the condition was created at a certain time.

Much stress is laid on the fact that the respondent was not called to deny Boetcher's affidavit that he had said, prior to March 1st, that the shoulder was improving, nor any of the statements contained in that affidavit. Counsel again overlooks the fact that respondent had already testified that, throughout the whole period, the shoulder had become steadily

worse, and that he had suffered no injury to it save that of February 3d. Attention is also directed to the fact that respondent was not called to deny Dr. Bowlby's statement that he had heard respondent admit in Dr. Riley's office that the arm was improving. Here, again, counsel overlooks the fact that respondent had already denied that he ever saw Dr. Bowlby in Dr. Riley's office or elsewhere. The evidence was conflicting. The question of negligence was clearly one for the jury, even as an original question. Moreover, all question as to the sufficiency of the evidence is foreclosed by the decision on the former appeal. The same argument, based upon substantially the same evidence, and the additional evidence tending to show that Drs. Randolph and Austin had themselves dislocated the shoulder, was then made. Substituted for that we now have the controverted Boetcher testimony. If the evidence was sufficient to take that question to the jury then, so, also, is the evidence now before us. If it had not been considered sufficient, the case would have been dismissed for lack of proof. That decision is the law of the case. See: *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 145 Pac. 438.

Appellant requested an instruction to the effect that, in determining whether any act or omission on his part in diagnosing and treating the injury was a lack of due care and skill, the jury must be governed solely by the testimony of experts skilled in the practice and science of medicine and surgery. The request was properly refused. It was an admitted fact in the case, about which there was no dispute and on which the expert testimony on both sides coincided, that the application of the tests which the appellant claims he made would infallibly have demonstrated the existence or absence of a dislocation. It is also an undisputed fact, to which every expert witness, including the appellant, testified, that the failure to apply these tests would be a failure to exercise that reasonable and ordinary care and skill used by physicians and surgeons engaged in the same

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line of practice in similar localities. The sole controverted question was whether the appellant had applied those tests. This, it was admitted, could be determined by any evidence as to what the appellant actually did or failed to do in his examination of the arm. That being the sole disputed question, it would have been both unnecessary and confusing to have submitted to the jury the technical question as to what tests should have been made.

The court instructed the jury on this subject as follows:

"You are instructed that there is no difference of opinion among the expert physicians and surgeons who have testified in this case as to the manner of examination and application of tests in a case of such an injury as the plaintiff claims to have received. The physicians who have testified have all agreed to the nature, extent, and method of such preliminary examination. The defendant claims to have used these tests and to have made such examination; and whether he did or did not do so, is the question of fact to be determined by you from the testimony in the cause and under the same rules as the other testimony is to be considered and as herein set out for your guidance."

Appellant urges that the giving of this instruction was grave error. But what we have already said touching the requested instruction makes it plain that the trial court took the proper view of the matter and submitted to the jury the one question about which there was any dispute. We find no error in this instruction.

Finally, it is urged that the verdict is excessive. In this view we concur. The evidence indicates that the shoulder has entirely recovered and is now giving the respondent no pain. While it is true that some of the effects of the operation are permanent in their nature, the evidence shows that the respondent's earning capacity is not materially diminished. It is true that he cannot perform those tasks which necessitate lifting above the level of his shoulder, and it is true also that he has suffered much pain, inconvenience and considerable expense. The joint, however, so far as the evi-

dence shows, is otherwise unimpaired. In *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406, a case similar to this in many respects, the shoulder joint was permanently impaired, the head of the humerus was partially removed, the arm was permanently shortened, and had permanently lost perhaps seventy-five per cent of its original power and scope of motion. The results were evidently much more serious than those found here. In that case a verdict for \$5,500 was held to evidence passion and prejudice, and was reduced in the sum of \$2,000. We think a reduction in about the same proportion is essential to meet the ends of justice in this case. If, therefore, the respondent will, within thirty days after the transmission of the remittitur from this court, consent in writing to remit \$1,600 from the judgment, it will stand affirmed in the remaining sum of \$2,400 and costs, and bear interest from the date of its original entry. Otherwise a new trial will be awarded. Costs in this court to appellant.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 13054. Department One. February 17, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. H. L. SANFORD,
Appellant.¹

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT CERTIFICATE—INFORMATION. Under Rem. & Bal. Code, § 8386, making it unlawful to treat the sick without having a certificate authorizing the practice of (1) medicine, (2) osteopathy, or (3) any other system of treating the sick, an information charging the practicing of medicine and the treatment of the sick by the chiropractic method without having a certificate in any form, alleges facts sufficient to constitute the statutory offense, without stating which one of the three certificates provided for by law the accused should have had.

SAME. An information under said section charging the unlawful practice in K. county, without alleging the residence of the accused, is sufficient, even though the statute authorizes the holder of a certificate to record it in the county of his residence and thereupon practice in any other county of the state; since practice in K. county without any certificate constitutes the offense.

SAME—PRACTICE WITHOUT AUTHORITY—INFORMATION—DUPLICITY—SUFFICIENCY. Although Rem. & Bal. Code, § 8395, makes it an offense to practice medicine without having a certificate recorded in the county in which he is practicing, which must be recorded anew upon any change of residence, and § 8400 making it an offense to practice without having a certificate, an information is not duplicitous in that it charges the offense of practicing without having the certificate recorded and also the offense of practicing without having a certificate, where it does not state sufficient facts to charge a complete offense of practicing without recording the certificate in the county of his residence; since its allegations in that respect, being insufficient to sustain a conviction, may be rejected as surplusage.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 8, 1915, upon a trial and conviction of practicing medicine without a license. Affirmed.

Willett & Oleson and *Morris & Hartwell*, for appellant.

Alfred H. Lundin, *Frank P. Helsell*, and *Joseph A. Barto*, for respondent.

¹Reported in 154 Pac. 1114.

FULLERTON, J.—The appellant was convicted of the offense of practicing medicine without a license. The questions suggested for reversal are all based upon the information, which, omitting the caption and conclusion, reads as follows:

“I, John F. Murphy, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse H. L. Sanford of the crime of practicing medicine without a license, committed as follows, to wit:

“He, said H. L. Sanford, in the county of King and state of Washington, on the 17th day of November, 1914, did then and there, wilfully and unlawfully practice and attempt to practice and hold himself out as practicing medicine and treating the sick and afflicted by the chiropractic method, and then and there advertising that he would treat the sick and afflicted in said county and state by said method, and that then and there by said chiropractic method treating and attempting to treat one Mary B. Fox as sick and afflicted and by diagnosing and pretending to diagnose the affliction of said Mary B. Fox and by said chiropractic method then and there treating the said Mary B. Fox as a sick and afflicted person, for which treatment he, said H. L. Sanford, charged said Mary B. Fox the sum of two dollars (\$2) therefor, all without having at the time of so doing a valid, unrevoked certificate from the state board of medical examiners authorizing him to treat the sick and afflicted in the county of King and state of Washington, and without having any such certificate recorded in the office of the county clerk of King county, state of Washington, contrary to the statute in such case made and provided and against the peace and dignity of the state of Washington.”

The statutes of this state regulating the practice of treating the sick or afflicted creates a board of medical examiners, and gives such board authority to issue certificates to persons entitled to practice any of the lawful systems or modes of so doing. Three forms of certificates are provided for; first, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the

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holder thereof to practice osteopathy; and third, "a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or afflicted not referred to in this section." Rem. & Bal. Code, § 8386 *et seq.* (P. C. 333 § 1). By § 8400 (P. C. 333 § 27) it is made a misdemeanor for any person to practice, attempt to practice, or to hold himself out as practicing, medicine and surgery, osteopathy, or any other system or mode of treating the sick or afflicted, without having, at the time of so doing, a valid unrevoked certificate issued to him by the board of medical examiners.

It is the appellant's first contention that the information is fatally defective, "in that it does not state which one of the three certificates provided for by statute appellant should have had to enable him to do what the state undertook to charge him with having done, and also in not showing which of the three classifications provided for by the statute defendant came under." But it seems to us that an information may charge an offense under the statute without including either of these matters. The statute, while it may or may not prohibit a person holding one form of certificate from practicing a system or mode of treatment authorized by another, clearly prohibits a person holding no certificate at all from practicing, attempting to practice, or holding himself out to practice, any system or mode of treatment. An information, therefore, which charges a person with practicing a form of treatment of the sick and afflicted without having a certificate in any form authorizing him to treat the sick or afflicted states an offense under the statute, even though it does not state the particular form of certificate he should have possessed in order to entitle him to practice the particular system or mode of treatment he actually practiced. In our opinion, the information in the present case, while somewhat crude, is thus definite. In effect it charges the defendant with wilfully and unlawfully practicing, attempting to practice, and holding himself out as practicing

in the county of King, state of Washington, a system and mode of treating the sick and afflicted known as the chiropractic method, and with actually treating one Mary B. Fox, as sick and afflicted, by such chiropractic method, all without having, at the time of so doing, a valid unrevoked certificate from the state board of medical examiners authorizing him to treat the sick and afflicted in such county and state. Clearly it would not aid the understanding to include therein a statement of the character of certificate the appellant should have possessed in order to entitle him to practice the system or mode of treatment he attempted to practice, or to state under which of the three classifications provided for by statute a person would fall who practiced the system or mode of treatment employed by the defendant.

Again, it is said that the information is fatally defective because it does not allege that the defendant is a resident of King county. In support of this, it is argued that it is sufficient for the holder of a certificate to record it in the county of his residence in order to entitle him to practice his profession in any county of the state, and that the information, inasmuch as it fails to allege the residence of the defendant, does not negative the idea that his practice in King county was lawful. But, as we say, the allegation is that he practiced in King county without having a certificate authorizing him to practice in that county. It may be that, in order to convict the defendant of unlawfully practicing in King county without a certificate, the state would be obligated to show that he had no certificate entitling him to practice in any county of the state, but this fact does not render the allegation insufficient. If he practiced in King county without right he was guilty of an offense under the statute, and an information which charges him with so doing charges an offense.

Section 8395 (P. C. 333 § 17) of the statute makes it an offense for any person holding a certificate entitling him to practice the medical profession in any of its forms to so

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practice without having the certificate recorded in the county in which he is practicing; further providing that, on each change of residence, he must have the certificate recorded anew in the county to which the change is made; while § 8400 (P. C. 333 § 27), as we have noted, makes it an offense to practice without having such a certificate. The appellant, construing the first of the cited sections to require a recording only in the county of the residence of the practitioner, contends that the information is duplicitous in that it charges the offense of practicing without having his certificate recorded, and also the offense of practicing without a certificate. But while the information contains language applicable to the offense of practicing without having a recorded certificate, it manifestly does not state sufficient facts to charge a complete offense in that respect. In other words, the defendant could not, on this information, have been legally convicted of practicing his profession without having his certificate authorizing him to so practice recorded in the county of his residence. To constitute duplicity the information must charge two complete offenses. If it charges one complete offense and states facts which incompletely describe another offense, the latter statements do not vitiate the information, but may be rejected as surplusage. *State v. Haskell*, 76 Me. 399; *State v. Comings*, 54 Minn. 359, 56 N. W. 50; *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086; *People v. Casey*, 72 N. Y. 393; *State v. Darden*, 117 N. C. 697, 23 S. E. 106.

Our conclusion is that the judgment should stand affirmed. It is so ordered.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13126. Department Two. February 17, 1916.]

CHARLES SALLY, *Appellant*, v. WHITNEY COMPANY,
Respondent.¹

ADJOINING LANDOWNERS — NEGLIGENCE — COLLECTING DEBRIS AND WATER AGAINST BRICK WALL—LIABILITY. The builder of a structure adjoining plaintiff's building, who allowed mortar and debris to choke a long and narrow space between the buildings on plaintiff's land, is liable for the damages resulting when the normal rainfall in the winter season saturated the debris until the collected water oozed through plaintiff's brick wall and injured the wainscoting inside.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 9, 1915, upon findings in favor of the defendant, in an action in tort. Reversed.

Vanderveer & Cummings, for appellant.

George R. Biddle, for respondent.

BAUSMAN, J.—Plaintiff sues in damages the builder of a structure adjoining his own, who allowed mortar and other debris to choke a long and very narrow space lying between the two and belonging to the land on which plaintiff's building rested. In the following season the ordinary rainfall saturated this debris until the absorbed or collected water oozed through plaintiff's common brick wall, twelve inches in thickness, and injured the wainscoting inside.

Liability in tort, exceeding that of contract, cannot safely be defined. Each case must be decided upon its own facts. On the one hand, the law does not wish to punish too severely the careless man; on the other, it is he that is at fault in some degree when the damaged party may not be at fault at all. The former must not, accordingly, expect easy limitations. And the law holds him liable in two classes of consequences from his fault, one where purely physical or natural causes set in motion go beyond what ordinarily follows,

¹Reported in 154 Pac. 1089.

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and second, where an intervening cause appears in an unexpected meddler who makes things worse.

In *Eskildsen v. Seattle*, 29 Wash. 588, 589, 70 Pac. 64, we quoted with approval the Lord Chief Justice's statement of the law in *Byrne v. Wilson*, 15 Irish C. L. 332, that the tortfeasor's liability is "not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty."

This he held applicable where a defendant stagedriver's negligence tipped the coach into a canal lock, and yet no injury would have come to plaintiff save for the blunder of a lockkeeper who turned in the water. In *Akin v. Bradley Eng. & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586, we applied the same doctrine with more rigor to him who left dynamite in a field where a child chanced to come upon and blast it. There we expressed the view that the child's exploding a piece of this dynamite by means of a dry battery which he obtained was not too remote a consequence to be answered for under the rule, though we then put the rule in these words:

"Where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause, or to have contributed thereto."

In the *Eskildsen* case, Seattle was held liable for injuries to a boy who, when his foot was caught in a defective street, was run over by a negligently operated locomotive of a railway company, and this decision was approved as upholding proximate cause in another case (*Thoresen v. St. Paul & Tacoma Lumber Co.*, 73 Wash. 99, 131 Pac. 645, 132 Pac. 860), where, under different facts, a third person's negligence contributed to the ultimate mischief.

Here the result came of a succession of physical causes naturally convening. Sooner or later this choking must have some effect on the wall, if not in one season, then in two

or three or more. This is not, let it be remembered, a case of unprecedented rains, for the lower court expressly found the rainfall to have been normal. Now the builder is presumed to have known that this debris would absorb and obstruct rain; that in this climate rain in considerable quantities must fall, and that rain stopped and collected against a wall must tend to soak into or through it. That it would probably soak through a three-inch wall the builder would have to admit, and the most he can say is that he did not believe that it would ever penetrate a twelve-inch wall. In short, defendant but debates degree. He has set in conjunction two natural forces and merely argues that he did not think they would go so far. He must respond to the consequence. It was he who was in fault, not the plaintiff; and he must make, at his own peril, estimates as to the effect of natural forces set in motion. He is in a far poorer position to complain than if he were held liable for the capricious or unexpected act of a third person.

Allowing to the findings of the lower court all proper presumptions of fact, we are nevertheless of opinion that it was in error. The judgment is reversed, with instructions to enter one in favor of plaintiff for his ascertained damages, \$1,011.85.

MORRIS, C. J., HOLCOMB, MAIN, and PARKER, JJ., concur.

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Opinion Per HOLCOMB, J.

[No. 13237. Department Two. February 17, 1916.]

E. R. BUTTERWORTH, *as E. R. Butterworth & Sons,*
Appellant, v. REA F. BREDEMEYER, *Administratrix*
*etc., Respondent.*¹

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS—FUNERAL EXPENSES—STATUTES. A claim against an estate for the funeral expenses of the deceased must be presented for allowance or rejection within the year allowed by the statute of nonclaim, in view of the various provisions of the statute, particularly, Rem. & Bal. Code, § 1479, providing that no holder of any claim against an estate shall maintain an action thereon unless the claim shall have been first presented, § 1568, giving priority in the order of payment of debts and claims against the estate, to funeral expenses, and § 1543, whereby the party rendering such service, may, if he sees fit to do so, look directly to the administrator for payment of his claim.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 22, 1915, in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Karr & Gregory, for appellant.

Jay C. Allen (Philip Tindall, of counsel), for respondent.

HOLCOMB, J.—Appellant, who furnished goods and performed services for the funeral of J. A. O. Bredemeyer, deceased, upon the order of his surviving widow, Rea F. Bredemeyer, failed to comply with Rem. & Bal. Code, §§ 1470 and 1472 (P. C. 409 §§ 335, 339), which require all claims against deceased to be presented for allowance or rejection within one year from the date of the first publication of notice to creditors. The lower court held that the claim is barred.

Appellant asserts that a claim for funeral expenses does not come within the provisions of the statutes. It is contended that the claim is not a debt of the deceased, and that

¹Reported in 155 Pac. 152.

the rule is that the statutes requiring claims to be presented refer to claims arising out of transactions with deceased which mature either before or after death. It is said that:

“By the great weight of authority, the reasonable costs and charges of the funeral constitute a claim against the estate, or more properly a charge upon the estate for which the executor or administrator is liable as such to the extent of the assets in his hands; in such cases the law implies a promise to pay therefor.” 8 Am. & Eng. Ency. Law (2d ed.), p. 1024.

Text writers and authorities are cited to the effect that statutes of nonclaim only require the presentation of demands arising out of contracts or transactions with the decedent, and do not apply to demands arising out of contracts, express or implied, with the executor or administrator; that a claim for funeral expenses or for taxes assessed after the death of the property owner need not be presented; that a limitation provided by statute for commencement of an action upon a rejected claim does not apply to a claim which it is not necessary to present to the executor or administrator, as one for funeral expenses. 8 Am. & Eng. Ency. Law, (2d ed.), p. 1064; 1 Ross, Probate Law and Practice, p. 531; 1 Church, Probate Law, pp. 700, 749; *Potter v. Lewin*, 123 Cal. 146, 55 Pac. 783; *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286; *Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832.

In this state we have several statutes relating to the presentation and allowance of claims against a decedent's estate. Section 1472, Rem. & Bal. Code (P. C. 409 § 339), provides that, if a claim be not presented within one year after the first publication of the notice, it shall be barred. Section 1474 (P. C. 409 § 343), provides that, upon the presentation of such a claim properly verified, the administrator or executor shall allow or reject the same. If rejected, the claimant shall be notified forthwith. Section 1477 (P. C. 409 § 349)

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provides that, when a claim is rejected by the executor or administrator or the court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection or the claim shall be forever barred. Section 1479 (P. C. 409 § 353) provides:

“No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator.”

Section 1568 (P. C. 409 § 553) gives priority in the order of payment of debts and claims against the estate to funeral expenses. In view of § 1479 (P. C. 409 § 353) and of our construction thereof in *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480, we must still consider that the decisions in other states, that a funeral claim, not being a debt against the decedent, is not within the statutes requiring a claim to be presented to the executor or administrator, do not apply in this state. In the *Barto* case it was said:

“It is unreasonable to suppose that the legislature would have made provision for the payment of contingent claims by the executor or administrator, did it not also intend to provide that such claims should be presented for payment.

“And if we are to give effect to all these provisions of the statute, and the general rules of statutory construction applicable thereto, it is obvious that the word ‘claim’ must have a uniform sense throughout the statute and be held to include every species of liability which the executor or administrator can be called on to pay, or to provide for the payment of, out of the general fund belonging to the estate.”

The above language must be construed sensibly, of course, for it is not to be considered that the government would be required to file a claim against an estate for taxes due upon the estate either before or after the decease of the owner. Taxes are a primary obligation and must be paid regardless of the presentation of any claim therefor. The same may be said of the court fees and costs incurred during the administration of the estate. In *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395, it was held that the proper presentation of

the claim was a matter which the administrator or executor could not waive in view of our special statute of nonclaim; that "all claims against estates are collectible under the statute, and not otherwise;" that the statute says that "no holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator;" that "this section has been held mandatory by this court."

The party rendering such service, if he sees fit or agrees with the administrator to do so, may look directly to the administrator for payment of his claim, being governed, of course, by another provision of the statute, Rem. & Bal. Code, § 1543 (P. C. 409 § 503), to the effect that no executor or administrator shall be chargeable to pay the debts of the testator or intestate, unless the claim or some memorandum or note thereof is in writing signed by such executor or administrator, etc. If he claims that the estate is indebted to him for the value of his goods or services and seeks to hold it liable, he should, under the provisions of § 1479, *supra*, authenticate and present his claim for allowance and approval as other debts of the estate, and when this is done it will be classified and paid according to its order of priority. *Gamage v. Rather*, 46 Tex. 105.

The judgment of the lower court is right and is affirmed.

MORRIS, C. J., MOUNT, PARKER, and BAUSMAN, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 12745. Department One. February 19, 1916.]

CONSTANT OTTEVAERE *et al.*, *Appellants*, v. THE CITY OF
SPOKANE, *Respondent*.¹

WATERS AND WATER COURSES—INJURIES FROM WATER SERVICE—DEFECTIVE METER—PROXIMATE CAUSE. Negligence of a city in installing a defective water meter is not the proximate cause of an injury caused by slipping on a wet floor while attempting to turn the stop valve, when the meter broke and flooded the basement; since the accident could not be reasonably anticipated, and the city is, therefore, not liable therefor.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 23, 1915, upon granting a nonsuit, dismissing an action for personal injuries. Affirmed.

Plummer & Lavin and *Harry L. Cohn*, for appellants.

H. M. Stephens, *Wm. E. Richardson*, *Ernest E. Sargeant*, and *Dale D. Drain*, for respondent.

FULLERTON, J.—This is an appeal from a judgment rendered in favor of the respondent and against the appellants on a challenge to the sufficiency of the evidence, in an action to recover for personal injuries suffered by the appellant Eugenie Ottevaere.

The record discloses that the appellants are the owners of certain real property situated in the city of Spokane, consisting of a lot with a dwelling house thereon. The premises are supplied with water from the city water system, the supply pipes entering the house in the basement near the floor. Some time in April, 1914, the appellants petitioned the city to install a water meter on the supply pipe, and the city did so, placing the meter inside of the basement of the house. The meter was installed in the usual manner with a stop and waste valve between the meter and the source of

¹Reported in 155 Pac. 146.

supply. The stop and waste valve had on it a projection or handle so as to be worked by hand without the aid of wrenches, and was so arranged that, when the source of supply was cut off, it would operate as a drain for the water in the pipes which carried water into the different rooms of the house. After the installation of the meter, the appellants, for its better protection, built around it a concrete box.

On October 7, 1914, the meter suddenly gave way, permitting the water flowing through the service pipe to escape into the basement. The appellant Eugenie Ottevaere, discovering the break, went into the basement and sought to stop the flow of the water by turning the stop and waste valve. The place surrounding the meter was dry when she reached it, but soon thereafter the water covered the floor, making it, as she testified, very slippery. The valve fit close and failed to turn with ordinary pressure. The appellant thereupon exerted her full strength upon it, and while so doing, her feet slipped on the wet floor, causing her to fall upon the concrete box. This action was instituted to recover for the injuries suffered from the fall.

In their complaint, the appellants charged the city with negligence in the installation of both the meter and the stop and waste valve. It is alleged that the meter was defective in construction and insufficient, because thereof, to stand the strain caused by the pressure of the water; and that the stop and waste valve was defective in that it was fitted too closely, preventing it from being turned with an ordinary amount of strain upon the handle. But without specially reviewing the record, we think it can be questioned whether there was any substantial evidence tending to support either of these contentions. The court, however, sustained the challenge to the sufficiency of the evidence on the ground that the negligence charged was not the proximate cause of the injury; and, as we have reached the conclusion that the judgment must be sustained on this ground, we will notice only the question suggested by the ruling.

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All of the cases agree that an injury which is the natural and probable consequence of an act of negligence is actionable, and that such an act is the proximate cause of the injury. It is equally well settled that an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and that such an act is either the remote cause, or no cause whatever, of the injury. The present case, we are clear, falls within the latter rule. The city could not reasonably anticipate that the breaking of the water meter, or the strain required to turn the stop valve, would cause the peculiar accident suffered by the appellant. It could anticipate, of course, that an attempt would be made to shut off the water by turning the stop valve if the water meter broke and let the water escape in the basement. Indeed, that was one of the purposes for which the stop valve was installed. But it could not reasonably anticipate that a lift thereon would cause the person making the lift to fall on the floor. It is possible for such a thing to happen, but it is not the usual nor the natural result of such an act. On the contrary, it is the unusual and unnatural result of such an act, and these the city is not required to anticipate. To hold otherwise would make the city an insurer against all acts arising from a break in its water system caused by a defect therein. It would be liable whenever the negligence furnished a condition by which the injury was made possible, however remotely the condition and injury might be separated, if only the injury can be traced to the negligent act by a sequence of causes. But as was said by the supreme court of the United States in *Scheffer v. Railroad Co.*, 105 U. S. 249, holding a railroad company not liable for the death of a passenger who committed suicide while insane as the result of the injury while such a passenger:

“The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of

mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends."

It is our conclusion that the judgment should be affirmed, and it is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13231. Department One. February 19, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Gold Creek
Antimony Mines & Smelter Company, Plaintiff*, v. THE
SUPERIOR COURT FOR OKANOGAN COUNTY,
*Respondent.*¹

APPEAL—STATEMENT OF FACTS—TIME OF FILING—EXTENSION—EXCUSABLE FAILURE. An extension of time for the filing of a statement of facts will be granted by the supreme court, under Laws 1915, p. 303, § 8, authorizing such extension where the failure to file in time is "found excusable," where it appears that negotiations for a settlement were conducted in good faith for two months, the appellant had no notice of the filing of findings for one month, and took an appeal when the negotiations failed, when the time for filing a statement had expired.

SAME—COSTS. Upon granting an extension of time for filing a statement of facts, after excusable failure to file in time, under Laws 1915, p. 303, § 8, the supreme court will impose terms, requiring in this case, the payment of \$100 and the costs of the application.

Certiorari to review an order of the superior court for Okanogan county, Pendergast, J., entered July 29, 1915, denying a motion to grant an extension of time for filing and serving a statement of facts. Reversed.

Geo. D. Emery, for relator.

C. W. Strother and Smith & Gresham, for respondent.

¹Reported in 155 Pac. 145.

MOUNT, J.—This writ was sued out by the relator to review an order of the superior court for Okanogan county refusing to grant an extension of time within which to file and serve a statement of facts in a case upon appeal to this court.

The facts are these: An action was brought in the superior court for Okanogan county by the relator against C. E. Perry and Pete Bryan. After the issues were made up, the case was regularly tried to the court, and on July 29, 1915, findings of fact and a decree were entered against the plaintiff in that action. Neither the plaintiff nor its attorneys had notice of the filing of the findings of fact or the entry of the decree until the 30th day of August, 1915. After the plaintiff's attorneys discovered that the findings of fact and judgment had been entered, written exceptions to the findings were served and filed.

During all of the months of August and September, the plaintiff and the defendants, and their respective counsel, were engaged in negotiations for a mutual adjustment and settlement of the matters embraced in the litigation, with reasonable hopes of making a settlement so as to avoid the necessity of further litigation. Negotiations continued until the first day of October, 1915. Thereupon the plaintiff gave notice of appeal from the judgment to this court, and filed a bond. The thirty days from the entry of the judgment had then expired within which a statement of facts might be filed. The appellant thereupon ordered a statement of facts, and endeavored to secure a stipulation from counsel for the respondents to extend the time for service of the statement of facts. In this they were not successful. They thereupon filed a motion in the superior court for an order extending the time within which to file and serve a statement of facts to and including October 27, 1915. This motion was noted for hearing on October 23. The judge was then absent from Okanogan county temporarily, and the motion was submitted

to him without argument. On the 27th day of October, that being the last day in which the statement could be served within the ninety-day period from the date of the judgment, the statement of facts was filed by the appellant. Thereafter, on November 8, the judge notified counsel for the appellant that he did not consider the showing made a sufficient cause, and denied the motion. Thereafter additional affidavits were filed, and a show cause order was issued by the court on November 24 requiring the respondents to appear and show cause why the time should not be extended. Upon argument of this motion, the trial court was of the opinion that he could not at that time grant an extension, and denied the motion. Thereupon application was made to this court for this writ.

It is argued by the relator that the trial court abused its discretion in denying the above mentioned motions for an extension of time in which to file and serve a statement of facts. In view of the statute hereinafter quoted, we think it is unnecessary to determine whether the trial court abused its discretion, or whether it had jurisdiction, after the expiration of the ninety days, to extend the time for filing and serving a statement of facts. The statute at § 8, p. 303, Laws of 1915, provides as follows:

“In case of a failure of the appellant to serve an abstract of record and statement of facts, or the one served is insufficient, the supreme court shall, if such failure is found to be excusable, allow the appellant a reasonable time, upon such terms as the court may impose, in which to supply such abstract of record and statement of facts.”

The statement of facts filed on the 27th day of October, 1915, was insufficient because it was filed after the thirty-day period had expired, and without an order extending the time therefor. The excuse made, as we have indicated above, is that, after the judgment was entered, negotiations were entered into for a settlement of the case. It is not disputed

that these negotiations were pending during the months of August and September, 1915. It is not disputed that these negotiations were conducted in good faith and, as counsel state, with reasonable hope that the case might be finally settled without further litigation. We are inclined to think that this is a reasonable excuse sufficient for this court to now authorize an extension of time within which to file and serve a statement of facts under the statute quoted.

It is argued by the respondents that the relator here ought not to have relied upon these negotiations, but that he should have prepared and filed his statement of facts within the thirty-day limit, notwithstanding the fact that these negotiations were pending. But we think it is the policy of courts to encourage settlements in pending litigation, and that, where negotiations for settlements are conducted in good faith, and extend over a period of time, the parties to the settlement ought not to be penalized to the extent of being deprived of their rights upon appeal in case the settlement should fail. As stated above, we are of the opinion that this is a reasonable excuse for failure to file and serve a statement of facts.

We are of the opinion, however, that terms should be imposed in this and all other cases of this character. We think the statute contemplates that such terms be imposed in cases like this. The order will therefore be made upon terms of \$100, payable by the appellant to counsel for the respondents within thirty days after notification of this decision. It is further ordered that the appellant shall, within thirty days after such notification, refile and serve a statement of facts, and that within ten days thereafter the respondents may, if they desire, file amendments to the statement of facts proposed; and that the appellant have sixty days from the date of the settlement of the statement of facts within which to serve and file its opening brief on appeal. It is further ordered that the clerk of this court im-

mediately transmit the statement of facts filed here to the superior court of Okanogan county, and notify counsel of this decision. Costs of this application taxed against the relator.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 12610. *En Banc*. February 21, 1916.]

In re WEST WAITE STREET, SEATTLE, B. MAY WHITE *et al.*,
Appellants.¹

APPEAL — ABSTRACTS OF RECORD — STATUTES — RETROACTIVE OPERATION. Laws of 1915, p. 300, dispensing with abstracts of record on appeal in certain cases, whereby failure to file the abstract is no longer ground for dismissal of the appeal, being remedial and intended to relieve from hardships in a matter of procedure not affecting the merits, will be given effect as to appeals pending before the passage of the act.

APPEAL—RECORD—BILL OF EXCEPTIONS OR STATEMENT OF FACTS—NECESSITY. Where the invalidity of the order, appealed from as void on its face, appears from the transcript, no bill of exceptions or statement of facts is necessary.

TRIAL—VERDICT—CORRECTION—POWER OF COURT—EMINENT DOMAIN—AWARD. After a verdict is rendered and the jury is discharged, the court is without power to correct the verdict in matters of substance on the ground of inadvertence or mistake; and the correction of a verdict in eminent domain proceedings so as to divest the owners of title to a building which the verdict as rendered permitted them to remove, is a change in substance, reducing the amount of the verdict, which the court cannot make.

Appeal from an order of the superior court for King county, Tallman, J., entered September 14, 1914, modifying a judgment and verdict rendered in condemnation proceedings, after a hearing before the court. Reversed.

¹Reported in 155 Pac. 165.

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Opinion Per FULLERTON, J.

Charles M. Baxter, for appellants.

James E. Bradford, Melvin S. Good, and W. D. Covington,
for respondent.

FULLERTON, J.—In March, 1912, the city of Seattle, by ordinance duly enacted, provided for the establishment of a public street and highway in that city, called in the record West Waite street. The establishment of the street necessitated the taking and damaging of a large number of tracts of property held in private ownership, among which tracts were lot 1 and a portion of lot 2, all in block 1 of Madrona addition to West Seattle, owned by the appellants in this action. The ordinance authorized and directed the corporation counsel of the city to commence and prosecute such actions and proceedings as were necessary to acquire the property, and to ascertain the compensation to be paid the owners of the property taken and damaged in such acquisition. Pursuant to the authority thus conferred, the corporation counsel began the present action for the purpose directed, and, in the course of the proceeding, took a judgment of condemnation of the property of the appellants described in the ordinance, and had the compensation to be awarded them therefor fixed by a jury. The jury's verdict was as follows:

“We, the jury in the above entitled proceeding, duly impaneled and sworn, find that the just compensation to be paid to the owners, occupants and persons otherwise interested therein for the taking of the following described real property, to wit:

“That portion of lots one and two (1 and 2), block one (1), Madrona addition to West Seattle, now a portion of the city of Seattle, described as follows:

“Beginning at a point on the east line of said lot two (2), said point being distant twenty-eight and eighty-two one-hundredths (28.82) feet north from the southeast corner of said lot; thence north along the east line of said lots two and

one (2 and 1) a distance of thirty-one and eighteen one-hundredths (31.18) feet to the northeast corner of said lot one (1); thence west along the north line of said lot one (1) a distance of eighty (80) feet to the northwest corner thereof; thence south along the west line of said lots one and two (1 and 2) a distance of thirty and sixty-six one-hundredths (30.66) feet; thence easterly along a straight line a distance of eighty (80) feet to the point of beginning. North ten (10) feet of lot three (3), block one (1) in Madrona addition to West Seattle which the defendants King county, B. May White and A. L. White, her husband; Northern Life Insurance Co. a corporation; Jo Grace Million Brice and . . Brice, husband and wife; Ethlyn Million and . . Million, her husband claim to own or to be otherwise interested in, is the sum of forty hundred eighty nine and 60-100 dollars, which sum includes the cost of readjusting or moving the building—standing in whole or in part upon said land, to or upon the part of the land remaining, together with the depreciation in the market value of said building—by reason of said readjustment or moving. And we find that remainder of said lot not damaged by reason of the taking of said described real property.”

The verdict was returned on July 10, 1913, and on the same day a judgment in condemnation was entered in accordance with the verdict, to become operative on the payment to the appellants, or into the registry of the court, of the sum awarded by the jury. The appellants accepted the award of the jury without further contest, and later on the sum awarded was paid.

In July, 1914, nearly one year after the verdict had been rendered, the corporation counsel filed a petition with the trial court seeking a modification of the verdict and judgment. In the petition it is alleged that, in the verdict and judgment, certain language was used by inadvertence and mistake; that the verdict, instead of finding that the sum awarded included “the cost of readjusting or moving the building, standing in whole or in part upon said land, to or upon the part of the land remaining, together with the de-

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preciation in the market value of said building by reason of said readjustment or moving," should have found that it included ". . . the cost of taking the buildings, trees and shrubbery, standing in whole or in part upon said land, and that the remainder of said lots is not damaged by reason of the taking of said described real property." On the presentation of the petition, the court granted the same *ex parte*, modifying the judgment as requested. Later on, however, on the motion of the appellants, it set aside the *ex parte* order and set the matter down for a further hearing. On the subsequent hearing, it again granted the prayer of the petition, and modified the judgment accordingly. This appeal is from the order so entered.

The city moves to dismiss the appeal, basing its motion upon the grounds: (1) that the appellants' abstract was not served at the time of the serving of their opening brief, nor within the time they were required to file and serve such a brief; (2) that the abstract filed does not comply with the statute nor the rules of the court; (3) that the statement of the case in the appellants' brief does not refer to the abstract; and (4) that there has been no bill of exceptions or statement of facts filed and certified in the cause by the appellants, nor has any attempt been made to comply with the requirements of the statute in regard thereto.

Since the appeal in this cause was perfected, the act of the legislature of 1915 relating to the abstracts has gone into effect (Laws 1915, p. 300). It provides that, in all cases where no testimony is sent up with the record, or in which the statement of facts does not exceed one hundred pages of double space, typewritten evidence, no abstract of record shall be required. The present case falls within the exception, and the failure to file an abstract, or the filing of one defective in form, is, in such cases, no longer a ground for dismissing an appeal. This provision of the statute, we think, is applicable to the present appeal. The legislature

may not, of course, pass retroactive laws prescribing penalties for acts and omissions which were lawful when committed or omitted, but it may excuse delinquencies in matters of practice in pending proceedings, past as well as future. When the statute relates purely to remedies and will not work hardship or injustice, but will, on the other hand, better protect and preserve the rights of the parties, it will be given effect, even though the statute existing when the act of delinquency was committed might call for a different remedy. The delinquency complained of in the case at bar in no way affects the merits of the controversy, it was a mere incident of procedure; and since the legislature has said, in effect, that it is no longer a cause for denying to a party the right to have his cause heard on its merits, the court will give effect to the act, even as to causes pending when the act took effect.

The fourth ground of the motion is also without merit. The appellant contends that the order appealed from is void on its face, being one beyond the power of the court to make. This will appear, if it appears at all, from a transcript of the record. No bill of exceptions or statement of facts is necessary to show it. We conclude, therefore, that the motion to dismiss is not well taken.

On the merits of the controversy, we are clear that the court was in error. The fact that the verdict does not conform to the evidence, or is rendered through mistake and inadvertence, is a cause for setting aside the verdict, or, if not discovered until after judgment is entered, is a cause for setting aside both the verdict and judgment, but it does not give the court power to correct the verdict. The verdict is the jury's, not the court's, and the court's power in such cases is limited to seeing that the jury return a verdict correct in form and substance. It may not, after the verdict has been returned and the jury discharged, change it, over the objection of either of the parties, in matters of sub-

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stance. The change here made by the court was such a change. Under the verdict of the jury the appellants remained the owners of the building standing on the land condemned. They were at liberty to remove it and readjust it on the remaining portion of their property, or to dispose of it in any other manner they should deem fit, so long as they removed it from the property condemned. The change made by the court takes the building away from the appellants and vests title to it in the city. This is as much of a change in substance as it would have been had the court, under the same circumstances, ordered a reduction in the amount of the award made by the jury.

The city, in its brief, makes the statement that the condemnation proceedings involved numerous separate tracts of property, in some of which it was necessary to take the buildings thereon, and in others to permit their removal and readjustment; that forms of verdicts were printed and prepared for the use of the jury suitable for each condition, and that, in the appellants' case, a wrong verdict was by mistake given the jury. But if the record showed these facts, we cannot think the case would be altered. It is not claimed that the jury knew that such a mistake had been committed, and it is not to be presumed that they did not measure the value of the property taken in accordance with the form of the verdict submitted to them. At most the error would amount to a mistrial of the issues between the city and the appellants, requiring them to submit the question to another jury. It could not give the court authority to direct that a verdict be recorded as the verdict of the jury different in substance from that which the jury returned.

The order appealed from is reversed, and the cause remanded with instructions to deny the city's petition to annul the judgment in so far as it affects the property of the appellants.

MOUNT, HOLCOMB, BAUSMAN, CHADWICK, and PARKER, JJ.,
concur.

[No. 12910. Department Two. February 21, 1916.]

BERTRAND P. CASTNER, *Respondent*, v. OREGON-WASHINGTON
RAILROAD & NAVIGATION COMPANY, *Appellant*.¹

CARRIERS—CARRIAGE OF LIVE STOCK—NOTICE OF CLAIM. Presentation of a claim for injuries to stock, called for in the contract of carriage, is not a condition precedent to action, where, upon complaint of injury en route, the railroad company caused the stock to be unloaded and examined by veterinary surgeons to determine the extent of the injury; since the company received the protection accorded by the stipulation in the contract of carriage that all claims for loss or damage are waived unless presented within ten days from the date of unloading of the stock at destination and before mingling with other stock, and therefore cannot complain of want of notice.

SAME—CARRIAGE OF LIVE STOCK—LIMITED LIABILITY—APPORTIONMENT. Under a limited liability live stock contract of carriage, agreeing that the value of the live stock transported shall not exceed \$30 per head, and in no event shall the carrier's liability exceed \$1,000, injury to any animal may be recovered to the extent of \$30, whether entirely destroyed or not, and the carrier is not entitled to have the damages reduced to a proportionate part of the agreed value of \$30 per head.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 20, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bogle, Graves, Merritt & Bogle and *Carroll A. Gordon*, for appellant.

Sherwood & Mansfield, for respondent.

MAIN, J.—This action was brought to recover damages for injuries to cattle which, on December 17, 1913, were shipped from Gilberts, Illinois, to Monroe, Washington. The cattle thus shipped consisted of one carload of cows,

¹Reported in 155 Pac. 167.

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which in transit passed over the lines of three forwarding carriers and came into the possession of the Oregon-Washington Railroad & Navigation Company at Huntington, Oregon. From there the car was moved by that company to Spokane, Washington, where it was delivered to the Great Northern Railway Company for transportation to Monroe.

The injury complained of is said to have occurred as a result of the careless and negligent switching of the car in the defendant's yards at Spokane. After the drover, who accompanied the shipment, claimed that the cows were injured during the switching at Spokane, they were unloaded there. After the unloading, at the instance of the railroad company, two veterinary surgeons examined them as to the nature and extent of their injuries. They were subsequently reloaded and conveyed to Monroe.

The contract under which the shipment was made contained a provision that unless claims for loss or damage were presented within ten days from the date of the unloading of the stock at destination, and before such stock had been mingled with other stock, all claims would be waived; and also a provision which limited the liability of the carrier for loss or damage.

The cause was tried to the court and a jury, and a verdict was returned in favor of the plaintiff in the sum of \$240. Motion for judgment notwithstanding the verdict being overruled, judgment was entered upon the verdict. The defendant appeals.

The record presents two material questions: First, Can the respondent recover notwithstanding the fact that he failed to give the notice required by the contract? and second, What was the extent of the carrier's liability?

I. It is not claimed in this case that the notice provided for in the contract was given in substance or at all. A carrier may, by stipulation in the contract of shipment, provide that notice of any claim for loss or damage be given the shipper within a reasonable and prescribed time, and in a

certain manner, as a condition precedent to liability for loss. *Henry v. Chicago, Milwaukee & Puget Sound R. Co.*, 84 Wash. 633, 147 Pac. 425. The purpose of such notice is to enable the carrier, when a claim of loss for damage is presented, to investigate the nature and extent of the injury to the article which is the subject of the contract of carriage. Where the carrier has made an examination of the nature and extent of the injury claimed, the purpose of requiring notice has been accomplished and the same protection has been afforded as though the notice had been given. *Atchison, T. & S. F. R. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132.

In this case, when complaint was made that the cattle had been injured, the railroad company caused two veterinary surgeons to examine them and thus determine the nature and extent of the injuries, if any. Having availed itself of the opportunity thus afforded to make an examination, it has received the protection which was the purpose of the notice to the same extent as though notice had been in fact given.

The case of *Henry v. Chicago, Milwaukee & Puget Sound R. Co.*, *supra*, is easily distinguishable from this, so far as the question of notice may be involved. In that case, no notice was given. Neither did the carrier have any opportunity to make an investigation as to the nature and extent of the injury which it was claimed the stock had received. Here, while notice was not given, the carrier had the same opportunity to make the investigation as it would have had if the notice had been given, and made an investigation as to the nature and extent of the injuries claimed.

The case of *Kidwell v. Oregon Short Line R. Co.*, 208 Fed. 1, is not controlling. There the person in charge of the stock told a number of agents along the line that he intended to put in a claim for damages because the cattle had been handled badly. No claim was presented as required by the contract. Neither did the carrier have opportunity to examine the cattle as to the nature and extent of the injuries claimed, as in this case.

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II. Shipment in this case was made under what is known as a limited liability livestock contract. This contract provided that it was expressly agreed that the value of the livestock to be transported should not exceed \$30 per head; and that "in no event shall the carrier's liability exceed \$1,000."

The appellant construes the contract as fixing absolutely the value of the cows at \$30 per head, and that, if any cow in the shipment was injured or damaged, but the injury or damage did not entirely destroy the value of such cow, then the amount of recovery would be such proportion of the agreed value of \$30 as the actual damage bears to the actual value. The effect of this construction would be that, if the actual value of a particular cow were \$100, and the extent of the damage were \$50, the amount of recovery would be limited to \$15. The respondent construes the contract as fixing the measure or extent of the carrier's liability. According to this view, if the cow were worth \$100, and the damage were \$50, the amount of recovery would be \$30.

Contracts containing provisions similar to this one have been before the courts for construction, and the view is generally entertained that such stipulations are to be construed as permitting recovery for damage actually done, the amount recoverable not to exceed the sum stated in the contract. *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *United States Express Co. v. Joyce* (Ind.), 72 N. E. 865; *Illinois Cent. R. Co. v. Wilson & Co.* (Tenn.), 176 S. W. 1036; *Huguelet v. Warfield*, 84 S. C. 87, 65 S. E. 985.

In 4 R. C. L. p. 793, the rule upon this question is stated thus:

"Where it is provided in the bill of lading that the amount recoverable in case of 'loss or damage' shall not exceed a specified sum, the question arises as to the amount recoverable where the article is not lost, but merely injured. The parties may, of course, by express provision to that effect, stipulate that in case of partial loss the damages shall be proportioned on the basis of the sum named as the maximum limit, and ef-

fect will be given to such a stipulation. But where this is not done, the question becomes one of construction, and very generally the view is entertained that such stipulations are to be construed as permitting recovery for the damage actually done, the amount recoverable, however, not to exceed that agreed upon as compensation for a total loss."

Some other questions are raised by the appellant's brief, and while they have all been considered, they do not possess that degree of merit which would call for their detailed discussion.

The judgment will be affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and FULLERTON, JJ., concur.

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Opinion Per Curiam.

[No. 11305. Department Two. January 27, 1916.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v. W. R. TUTTLE,
Appellant.¹

Appeal from a judgment of the superior court for Spokane county, Pendergast, J., entered March 15, 1912, in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Harris Baldwin, for appellant.

Edward J. Cannon and *Cannon, Ferris & Swan*, for respondent.

PER CURIAM.—This case presents the same legal question involving the right of adverse possession of respondent's right of way as presented in *Northern-Pac. R. Co. v. Concannon*, 239 U. S. 382. The question being a Federal one, the cited case is controlling.

Judgment affirmed.

¹Reported in 154 Pac. 796.

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26. **APPEAL—REVIEW—VERDICT.** A verdict upon conflicting evidence, supported by substantial evidence, is conclusive on appeal. *Amwarter v. Kroll* 347
27. **APPEAL — REVIEW — FINDINGS.** Findings, where the trial court heard and saw the witnesses, will not be disturbed on appeal if the evidence does not preponderate against them. *Winter v. Eberhardt* 77
28. **APPEAL—REVIEW—FINDINGS.** When clear, cogent and convincing evidence is necessary to overcome a presumption, findings upon conflicting evidence will be reversed if the evidence supported by the presumption preponderates against the findings. *Chaffee v. Hawkins* 130
29. **APPEAL—REVIEW—FINDINGS.** Findings on conflicting evidence will not be disturbed when not against the preponderance of the evidence. *In re Connolly's Estate*..... 168
30. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence will not be disturbed on appeal when it cannot be said that the evidence preponderates against them. *In re Buchanan's Estate* 172
31. **APPEAL — REVIEW — FINDINGS.** Findings on conflicting evidence will not be set aside unless the evidence preponderates against them. *Russell & Gallagher v. Yesler Estate*..... 260
32. **APPEAL — REVIEW — FINDINGS.** Findings upon sharply conflicting evidence will not be disturbed on appeal, where it cannot be said that they are not supported by the evidence. *Angeles Brewing & Malting Co. v. Carter*..... 335
33. **APPEAL—REVIEW—FINDINGS.** A finding cannot be disturbed on appeal where the evidence does not preponderate against it. *In re Crim's Estate* 395
34. **APPEAL—REVIEW—FINDINGS.** A finding upon conflicting evidence, in an action at law tried to the court, will not be reversed on appeal where there is no preponderance of the evidence against it. *Folmsbee v. Daniell*..... 426
35. **APPEAL—REVIEW—HARMLESS ERROR.** Reversible error cannot be predicated on misconduct of counsel where it is clear that the verdict of the jury could not possibly have been affected thereby and the verdict should have been directed as rendered. *Davies v. Maryland Casualty Co.*..... 571
36. **APPEAL—REVIEW—HARMLESS ERROR.** Error in refusing to permit a witness to state who was the owner of stock purchased is not

APPEAL AND ERROR—CONTINUED.

- prejudicial where he detailed the circumstances from which the jury could draw the conclusion as to ownership. *Auwarter v. Kroll* 347
37. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for a broker's commissions, it is not error to refuse an instruction defining a real estate broker and stating the law as to liability for commissions, where the court instructed the jury that plaintiffs were real estate brokers, had made the sale and procured an able and willing customer and were entitled to commissions unless they had agreed to make no charge for commissions, thereby reducing the issues to their ultimate. *Payzant v. Caudill*..... 250
38. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction affecting only the liability of a joint tortfeasor dismissed out of the case by consent of the plaintiff. *Jensen v. Schlenz*..... 268
39. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error cannot be predicated upon the giving of an instruction upon the measure of damages when it could not have misled the jury when taken in connection with other instructions, some of them given at the request of the appellant. *Hardin v. Olympic Portland Cement Co.*..... 320
40. APPEAL—HARMLESS ERROR—VERDICT. In an action for wrongful death, the defendant is not prejudiced by allowing the jury to segregate the damages and bring in separate verdicts for the different beneficiaries, where it is not claimed that the total amount of the judgment is excessive. *Stephenson v. Parton*..... 653
41. APPEAL—REVIEW—HARMLESS ERROR. Error in allowing \$100 damages on account of plaintiff's expenses, which were limited by the instructions to \$40, is cured by the remitting of \$200 from the verdict. *Godley v. Gowen*..... 124

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

42. APPEAL—DECISION—QUESTIONS DETERMINED—LAW OF CASE. A decision, on appeal from an order granting a new trial for error of law, that error had been committed in the admission of evidence upon a second cause of action because the complaint was insufficient to state a cause of action, is not *obiter dictum* as to the sufficiency of the complaint, but was necessary upon the question of the propriety of granting the new trial, and becomes the law of the case and conclusive on a retrial. *Smith Sand & Gravel Co. v. Corbin* 43
43. APPEAL—DECISION—LAW OF CASE. A decision on a prior appeal that substantially the same evidence was sufficient, becomes the law of the case. *Hoffman v. Watkins*..... 661
44. APPEAL—DISMISSAL—JURISDICTION—JUDGMENT. Upon dismissal of an appeal upon jurisdictional grounds, the supreme court cannot

APPEAL AND ERROR—CONTINUED.

order an affirmance of the judgment. *Johnston v. Seattle Taxicab & Transfer Co.* 494

APPEARANCE:

1. **APPEARANCE — ANSWER AFTER AMENDMENT — SUFFICIENCY — JUDGMENT BY DEFAULT.** Where, after amendment of a complaint as to the name of the defendant, defendant, in compliance with an order to elect, elected to stand upon its amended answer already filed, which contained a general denial, there was a sufficient appearance by the defendant; and it was error to grant a judgment for plaintiff by default. *Freeborn v. Chewelah Copper King Mining Co.*.... 519

APPOINTMENT:

To fill vacancies in office of county board, see **COUNTIES**.

APPORTIONMENT:

Of damages for injury to live stock, under limited liability contract, see **CARRIERS**, 2.
 Of damages under Federal employers' liability act, for death of servant, see **MASTER AND SERVANT**, 18.
 Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 7.

APPROPRIATION:

Of state shore lands, priority of rights, see **NAVIGABLE WATERS**, 2.

ARBITRATION AND AWARD:

Conclusiveness of decision of architect as to claim for extras under building contract, see **CONTRACTS**, 4.

1. **ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE—CONSTRUCTION —BUILDING CONTRACTS—DECISION OF ARCHITECT—FINALITY.** An architect is not the final arbiter of claims for extras through changes in the plans, or for demurrage on account of delay, under a building contract providing that he shall value and appraise any alteration required and determine the amount to be added or deducted, and that, should any dispute arise respecting the true value thereof, the same shall be arbitrated by appealing to the city superintendent of buildings, whose decision shall be final and binding, that the decision of the architect shall be final in case of disputes as to the work to be done, and providing for demurrage in case of delay "subject to the right of arbitration above mentioned;" and where the arbitrator agreed upon refuses to act, the question is one for the courts, in view of the rule favoring the right to resort to the courts where the intention is doubtful. *Russell & Gallagher v. Yesler Estate* 260

ARCHITECTS:

Conclusiveness of decision respecting claims under building contract, see **ARBITRATION AND AWARD**.

Conclusiveness of decision respecting claim for extras under building contract, see **CONTRACTS**, 4.

Approval of work under contract, see **CONTRACTS**, 6.

ASSAULT:

Provoking assault by accused, see **HOMICIDE**.

ASSESSMENT:

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 1, 3-15.

ASSIGNMENTS:

Partial failure of consideration as defense to note in hands of assignee, see **BILLS AND NOTES**, 2.

Assignment of indemnity policy to judgment creditor by insolvent company, validity, see **CORPORATIONS**, 7.

Of indemnity policy to judgment creditor, see **INSURANCE**, 3.

1. **ASSIGNMENTS — EQUITABLE ASSIGNMENTS — SET-OFF AND COUNTERCLAIM—ASSIGNED CLAIMS.** Where plaintiff undertook to complete a defaulted contract for a public improvement, and to pay all claims against the defaulting contractor, the city, upon paying such claims, becomes the owner thereof by equitable assignment, subject to all defenses, and may offset the payments against plaintiff's action for the balance due on the contract, where they were shown to be valid claims and plaintiff was not deprived of any defenses that might be made against them. *Paul v. Vancouver*..... 331

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 10.

Of mortgage, see **MORTGAGES**.

ATTORNEY AND CLIENT:

Appealability of order denying motion to strike attorney's lien, see **APPEAL AND ERROR**, 3.

Misconduct of counsel as harmless error, see **APPEAL AND ERROR**, 19, 35.

Review of order denying motion to strike attorney's lien, pending appeal, see **CERTIORARI**.

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 8.

Attorneys in fact, see **PRINCIPAL AND AGENT**, 2.

Argument and conduct of counsel at trial in civil actions, see **TRIAL**, 4-6.

1. **ATTORNEY AND CLIENT—LIEN—VALIDITY—DETERMINATION — POWER OF COURT.** The statute being silent as to the procedure to enforce

ATTORNEY AND CLIENT—CONTINUED.

an attorney's lien upon a judgment, the court may determine the matter in some form of proceeding if the parties are properly brought before it. *State ex rel. Angeles Brewing & Malting Co. v. Superior Court* 342

2. **SAME—LIEN—VALIDITY—DETERMINATION—PROCEDURE — MOTION TO STRIKE—NECESSARY PARTIES.** The validity of an attorney's lien upon a judgment cannot be tested by plaintiff's motion to strike the lien, where the judgment subrogated to the rights of the plaintiff two insurance companies to the extent of a specific sum, and they were not made parties to the proceeding although affected by the lien, and other interested parties were compelled to come before the court on six days' notice, ignoring the statutory notice for litigants; since the motion was an independent proceeding requiring the presence of all interested parties. *State ex rel. Angeles Brewing & Malting Co. v. Superior Court* 342

AUTHORITY:

To order levy of reassessment, see **MUNICIPAL CORPORATIONS**, 10.
 Of agent, see **PRINCIPAL AND AGENT**, 2.
 Of public service commission on ordering physical connection between telephone companies, see **TELEGRAPHS AND TELEPHONES**.

AUTOMOBILES:

Accident insurance, losses covered, see **INSURANCE**, 2.
 Injury to servant in cranking automobile, see **MASTER AND SERVANT**, 7, 16, 17.
 Collision with street car at crossing, see **STREET RAILROADS**.

BAILMENT:

Agency or bailment, see **PRINCIPAL AND AGENT**, 1.

BAR:

Of action by limitation, see **LIMITATION OF ACTIONS**, 1.

BEST AND SECONDARY EVIDENCE:

In civil actions, see **EVIDENCE**, 1.

BILL OF EXCEPTIONS:

As part of record on appeal, see **APPEAL AND ERROR**, 15.

BILLS AND NOTES:

Indorsement of note by husband as surety as community debt, see **HUSBAND AND WIFE**, 6.
 Violation of usury laws, see **USURY**, 2, 3.

1. **BILLS AND NOTES — CONSIDERATION—PARTIAL FAILURE—EVIDENCE.** In an action on a note, a partial failure of consideration, as a defense *pro tanto*, is established, where the payee was unable to per-

BILLS AND NOTES—CONTINUED.

form its contract to furnish the maker a quantity of cement, to be measured by market value, which exceeded the amount due on the note. *Hamilton v. Ramage*..... 649

2. SAME—ASSIGNMENT—NOTICE OF DEFENSES. Partial failure of consideration is a good defense to a note in the hands of an assignee who took with full notice of the infirmity. *Hamilton v. Ramage* 649

BONA FIDE PURCHASER:

Of crop liened upon, see AGRICULTURE, 2.

BONDS:

Death as affecting liability of surety, see ABATEMENT AND REVIVAL.

Death of surety on supersedeas bond as affecting right of obligee to summary judgment, see APPEAL AND ERROR, 9.

Action against estate of surety, pending appeal, as election of remedy on supersedeas bond, see ELECTION OF REMEDIES.

Sureties on bonds, see PRINCIPAL AND SURETY.

Claims against bond of contractor on public work, see STATES.

BOOM COMPANIES:

Liability for loss of logs, see LOGS AND LOGGING.

BREACH:

Of contract, see CONTRACTS, 5, 7-12.

Damages for breach of contract, see DAMAGES, 3, 4.

Of contract by husband as binding community, see HUSBAND AND WIFE, 3, 4.

Of contract of sale, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER.

BRIEFS:

On appeal, see APPEAL AND ERROR, 10, 18.

BROKERS:

Harmless error in refusing to instruct as to law relating to liability for commissions, see APPEAL AND ERROR, 37.

Usurious profits of agents, see USURY, 2.

1. BROKERS—ACTION FOR COMMISSIONS—ISSUES AND PROOF. In an action for a broker's commissions, instructions upon an issue as to whether plaintiffs had agreed not to charge any commissions are proper where a trade had been contemplated, and one of the brokers admitted that he offered to either make the exchange or sell the property for cash clear without any commission, making a price "cash net to them." *Payzant v. Caudill*..... 250

BUILDING CONTRACTS:

See CONTRACTS, 4-6.

Agreement to submit to arbitration, see ARBITRATION AND AWARD.

BUILDINGS:

Damage to by negligence of adjoining landowner, see **ADJOINING LANDOWNERS**.

BURDEN OF PROOF:

To show good faith of transaction, see **FRAUDULENT CONVEYANCES**, 3.
To justify act or reduce degree of crime, see **HOMICIDE**, 1.

CANCELLATION:

Of assessment for want of jurisdiction, see **MUNICIPAL CORPORATIONS**, 14.

CANCELLATION OF INSTRUMENTS:

Rescission of contract for exchange of property, see **EXCHANGE OF PROPERTY**.

Termination of lease, see **LANDLORD AND TENANT**.

Rescission of contracts, see **VENDOR AND PURCHASER**, 1.

CARRIERS:

1. **CARRIERS—CARRIAGE OF LIVE STOCK—NOTICE OF CLAIM.** Presentation of a claim for injuries to stock, called for in the contract of carriage, is not a condition precedent to action, where, upon complaint of injury en route, the railroad company caused the stock to be unloaded and examined by veterinary surgeons to determine the extent of the injury; since the company received the protection accorded by the stipulation in the contract of carriage that all claims for loss or damage are waived unless presented within ten days from the date of unloading of the stock at destination and before mingling with other stock, and therefore cannot complain of want of notice. *Castner v. Oregon-Washington R. & Nav. Co.*..... 694
2. **SAME—CARRIAGE OF LIVE STOCK—LIMITED LIABILITY—APPORTIONMENT.** Under a limited liability live stock contract of carriage, agreeing that the value of the live stock transported shall not exceed \$30 per head, and in no event shall the carrier's liability exceed \$1,000, injury to any animal may be recovered to the extent of \$30, whether entirely destroyed or not, and the carrier is not entitled to have the damages reduced to a proportionate part of the agreed value of \$30 per head. *Castner v. Oregon-Washington R. & Nav. Co.*..... 694
3. **CARRIERS—INJURIES—TAKING ON PASSENGERS—WHO ARE—INSTRUCTIONS.** Upon an issue of fact as to whether plaintiff was a passenger upon defendant's street car, it is error to instruct the jury that in law a person becomes a passenger when he approaches a car in such a manner that the conductor, in the exercise of reasonable care, should ascertain that such person intends to board the car. *Dunn v. Puget Sound Traction, Light & Power Co.*..... 36
4. **SAME—INJURIES—TAKING ON PASSENGERS—WHO ARE—QUESTION FOR JURY.** Whether plaintiff was a passenger upon defendant's street

CARRIERS—CONTINUED.

car is a question of fact for the jury, where she testified that, while the car was waiting to take on passengers, she stepped on the first step before the gates were closed and was in the act of taking the next step when the car started, while the evidence of the defendant tended to show that the entrance gates were closed and the signal to go ahead given and that the car waited for the passing traffic and was started while the conductor was issuing transfers with his back turned to the closed gate. *Dunn v. Puget Sound Traction, Light & Power Co.* 36

5. **CARRIERS—INJURY TO PASSENGERS—TAKING ON PASSENGERS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.** In an action for personal injuries to an intending passenger, struck by a rapidly approaching eastbound street car, while he was about to board a westbound car on the other track, it cannot be said, as a matter of law, that the proximate cause of the injury was his contributory negligence in standing on or near the track without taking any precautions as to the cars approaching thereon from the opposite direction, if the motorman either saw, or by the exercise of proper care should have seen, him in time to have slackened the speed of the car and avoided the injury; but the question is for the jury, where the eastbound car was approaching at full speed without warning and without any attempt to stop it until within ten feet of the plaintiff. *Bemiss v. Puget Sound Traction, Light & Power Co.* 239

6. **CARRIERS — INJURIES — SETTING DOWN PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** There is no evidence of negligence to sustain recovery for injuries to a passenger in alighting from a street car, on a foggy night, where, after the destination was announced, she came to the vestibule and directed the conductor's attention to her suitcase, and immediately stepped off the car while it was gently coming to a stop, supposing that it had stopped, there being no sudden jerk, the street surface being smooth and safe and the car stopping within ten or twelve feet; since the announcement of the destination was not an invitation to alight until the car stopped, and under the circumstances the conductor was not negligent in failing to give notice that the car was still in motion. *Sumner v. Grays Harbor R. & Light Co.* 55

CERTAINTY:

As to terms of contract, see **CONTRACTS**, 1.
As to showing of loss of profits, see **DAMAGES**, 3.

CERTIFICATE:

Of acknowledgment of written instrument, impeachment of, see **ACKNOWLEDGMENT**.
Of architect as to completion of work, see **CONTRACTS**, 6.

CERTIFICATE—CONTINUED.

Practicing without certificate, see **PHYSICIANS AND SURGEONS**, 1-3.
 Tax certificate, foreclosure of, see **TAXATION**.

CERTIORARI:

1. **CERTIORARI—WHEN LIES—PROCEEDINGS ANCILLARY TO APPEAL—ATTORNEY'S LIEN—STRIKING.** The denial of a motion to strike an attorney's lien upon the judgment, pending appeal, for the reason that its validity could not be determined by such motion, being a proceeding ancillary to a case pending on appeal in the supreme court, is subject to review by writ of certiorari. *State ex rel. Angeles Brewing & Malting Co. v. Superior Court*..... 342

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 10, 12, 14, 16.
 To jury in civil actions, see **TRIAL**, 7-10.

CHATTEL LIENS:

See **LIENS**.

CHATTEL MORTGAGES:

Liability of mortgagees for wrongful taking of crop liened upon, see **AGRICULTURE**.

1. **CHATTEL MORTGAGES—GROWING CROPS—LEASED LANDS — TERMINATION OF LEASE—PRIORITIES.** A chattel mortgage upon a growing crop is subject to the express terms of the lease providing for its termination upon a sale of the land and payment to the tenant of the value of the crop; and upon termination of the lease pursuant to its terms, prior to severance of the crop, the crop passes to the purchaser, and neither the lessor nor the purchaser would be liable for the deficiency judgment against the lessee giving the mortgage on the crop. *Woody v. Wagner* 429
2. **CHATTEL MORTGAGES—CROPS—FORECLOSURE—NECESSARY PARTIES—CONVERSION—LIABILITY.** One who converts a portion of a mortgaged crop of wheat by commingling it with other wheat is not a necessary party to an action to foreclose the chattel mortgage on the crop, and in case of a deficiency judgment, is liable for the conversion, although not made a party to the foreclosure action. *German-American State Bank v. Seattle Grain Co.*..... 376
3. **SAME—FORECLOSURE—JUDGMENT.** Judgment for the debt in the foreclosure action did not operate as a release or waiver of the security. *German-American State Bank v. Seattle Grain Co.*.... 376
4. **SAME — CROPS — CONVERSION — LIEN OF MORTGAGE — SUBSEQUENT EQUITIES.** In such a case, it is no defense that the converted wheat was taken in payment for sacks furnished for the harvest of the crop, which was equitably bound for the sack account, as against the recorded lien of the chattel mortgage. *German-American State Bank v. Seattle Grain Co.*..... 376

CHECKS:

Special deposits, see DEPOSITS.

CHILD:

Places attractive to children, see NEGLIGENCE, 2.

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

Assigned claims, see ASSIGNMENTS.

For injury to live stock, see CARRIERS, 1.

For extras under building contract, see CONTRACTS, 4.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

For mechanics' lien, see MECHANICS' LIENS.

Against bond of contractor on public work, see STATES.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLISION:

Losses covered in automobile insurance policy, see INSURANCE, 2.

Between automobile and street car, see STREET RAILROADS.

1. COLLISION—INJURY TO VESSEL—NEGLIGENCE—FAILURE TO OBSERVE LIGHTS—LIABILITY. Where two steamers, the A. and the V. were approaching on opposite courses port to port, so that a third steamer, the C., following astern of the V. with the V. on her starboard bow, must have had an unobstructed view of the A., it was negligence, as a matter of law, for the C. to fail to observe the lights of the A.; and in case the collision was due to such negligence, it would be immaterial which vessel had the right of way. *Angeles Brewing & Malting Co. v. Carter*..... 335
2. SAME—NEGLIGENCE—FAILURE TO OBSERVE LIGHTS—FINDINGS AND EVIDENCE. In such a case, a finding of fact to the effect that the C. was first made aware of the proximity of the A., when the A. and V. had exchanged signals to port helms and the V. had swung to starboard, is not necessarily a finding that the A. was not in plain view of the C. prior to that time, so as to escape the imputation of negligence in failing to observe A.'s lights. *Angeles Brewing & Malting Co. v. Carter*..... 335
3. SAME—LOSS OF FREIGHT—VALUE—EVIDENCE—SHIPPING INVOICE—ADMISSIBILITY. Upon an issue as to the value of freight lost in a collision of steamers, duplicate invoices furnished by shippers to adjusters of the cargo are competent evidence of value, in the absence of evidence that the shippers' claims were fraudulent or in excess of the actual value of the goods lost and the amounts paid on that account. *Angeles Brewing & Malting Co. v. Carter*..... 335

COLLISION—CONTINUED.

4. **SAME—LOSS OF FREIGHT—REIMBURSEMENT—INTEREST.** In an action for damages from a collision, an award to reimburse the plaintiff for money paid out to shippers for freight lost should draw interest only from the time of the payments. *Angeles Brewing & Malting Co. v. Carter*..... 335

COLOR OF TITLE:

To sustain adverse possession, see **ADVERSE POSSESSION**, 2.

COMMENT:

On evidence by judge, see **CRIMINAL LAW**, 7.

On facts in instructing jury, see **TRIAL**, 7.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.

1. **COMMERCE—INTERSTATE COMMERCE—TRACK INSPECTORS.** One employed in inspecting the main line of an interstate railroad doing also an intrastate business, to see that no obstruction or defects existed, is engaged in interstate commerce. *Anest v. Columbia & Puget Sound R. Co.*..... 609

COMMISSIONERS:

Filling vacancies in office of county board, see **COUNTIES**.

COMMISSIONS:

Of broker, see **BROKERS**.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**.

COMPARATIVE NEGLIGENCE:

See **MASTER AND SERVANT**, 14.

COMPENSATION:

Of broker, see **BROKERS**.

For servant injured in extra-hazardous employment, see **MASTER AND SERVANT**, 1-5.

To contractor for changes in work as affecting validity of assessment for improvement, see **MUNICIPAL CORPORATIONS**, 8, 9.

COMPETENCY:

Of witnesses in general, see **WITNESSES**.

COMPLAINT:

In criminal prosecutions, see **INDICTMENT AND INFORMATION**.

In civil actions, see **PLEADING**.

COMPROMISE AND SETTLEMENT:

See ACCORD AND SATISFACTION.

COMPUTATION:

Of interest on installment note, see USURY, 3.

CONCLUSIVENESS:

Of record on appeal, see APPEAL AND ERROR, 10.

Of decision on appeal, see APPEAL AND ERROR, 42, 43.

Of decision of architect as to claim for extras under building contract, see CONTRACTS, 4.

Of settlement with contractor allowing extra compensation for changes in work, see MUNICIPAL CORPORATIONS, 9.

Of proceedings confirming assessment roll, see MUNICIPAL CORPORATIONS, 14.

Of recitals in judgment as to service of summons in tax foreclosure, see TAXATION, 3.

CONDITION:

Precedent to action for injury to live stock, see CARRIERS, 1.

Precedent to action by corporation, see CORPORATIONS, 8.

Precedent to action on bond of contractor on public work, see STATES, 1.

CONDUCT:

Of counsel as harmless error, see APPEAL AND ERROR, 19, 35.

Of judge at criminal trial, see CRIMINAL LAW, 7.

Of counsel at criminal trial, see CRIMINAL LAW, 8.

Of counsel at trial of civil action, see TRIAL, 4-6.

Of judge at trial of civil action, see TRIAL, 7.

CONFESSIONS:

Admissibility in evidence, see CRIMINAL LAW, 5.

CONFIRMATION:

Of assessment roll, conclusiveness, see MUNICIPAL CORPORATIONS, 14.

CONFUSION:

Of separate and community profits and earnings, see HUSBAND AND WIFE, 2.

CONSIDERATION:

For check or promissory note, see BILLS AND NOTES.

Admissibility of parol evidence to show, see EVIDENCE, 2, 6.

For oral promise to pay debt of another, see FRAUDS, STATUTE OF, 1.

On sale of husband's separate business as binding community to covenant not to engage in business for limited time, see HUSBAND AND WIFE, 3.

Payment of as creating trust in lands, see TRUSTS.

CONSTITUTIONAL LAW:

Indian treaty as impairing police power of future state, see **INDIANS**, 5-7.

Right to trial by jury, see **JURY**.

Invalid process on foreclosure of chattel lien as denial of due process of law, see **LIENS**.

Admeasurement of damages under industrial insurance act as exercise of police power, see **MASTER AND SERVANT**, 4.

Special or general laws, see **STATUTES**.

Privilege of witness, see **WITNESSES**, 5.

1. **CONSTITUTIONAL LAW—POLICE POWER—CONSERVATION OF FISH.** The police power is not confined to subjects of safety, but extends to those of convenience and prosperity, including the conservation of fish. *State v. Towessnute*..... 478
2. **CONSTITUTIONAL LAW—POLICE POWER—LEGISLATIVE QUESTIONS.** It is the province of the legislature to define the objects of the police power, and for the courts to determine whether the act is reasonably within the legislative power and the thing sought to be done fairly within the act. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.*..... 599
3. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LIENS—ON CHATTELS—FORECLOSURE.** Rem. & Bal Code, §§ 1105-1107, providing that chattel liens, under § 1157, shall be foreclosed as in the case of chattel mortgages by placing in the hands of the sheriff a notice, to be personally served as in the case of a summons (which may be by publication in case the defendant cannot be found within the state, of which the sheriff's return that he cannot be found in the county shall be *prima facie* evidence), which notice shall be authority for taking immediate possession of the property, provides for due process of law, in that it provides for notice and opportunity to be heard through the property owner's right to remove a cause to the superior court and contest the foreclosure; although it allows foreclosure of a lien against a resident of the state without personal notice. *White v. Powers* 502

CONSTRUCTION:

Of agreement to arbitrate, see **ARBITRATION AND AWARD**.

Of contract, see **CONTRACTS**, 3, 4; **USURY**.

Of deed, see **DEEDS**.

Of Indian treaty, see **INDIANS**, 3.

Of application of workmen's compensation act, see **MASTER AND SERVANT**, 1-5.

Of statute defining tide lands, see **NAVIGABLE WATERS**, 7.

Of right of way deed, see **RAILROADS**, 1, 2.

Of instructions, see **TRIAL**, 10.

CONTRACTORS:

On public work, see STATES.

CONTRACTS:

See ACCORD AND SATISFACTION; BILLS AND NOTES; DEEDS; INSURANCE; PARTNERSHIP; SALES.

Submission to arbitration, see ARBITRATION AND AWARD.

Carriage of live stock, see CARRIERS, 1, 2.

Of corporation, see CORPORATIONS, 6, 7.

Damages for breach, see DAMAGES, 3, 4.

Power to regulate private contracts of power company for sale of surplus power, see ELECTRICITY.

Parol evidence to vary written contract, see EVIDENCE, 2-7.

Rescission for fraud, see EXCHANGE OF PROPERTY; FRAUD, 4.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of husband or wife, see HUSBAND AND WIFE, 3-7.

Leases, see LANDLORD AND TENANT.

Agreements to toll statute, see LIMITATION OF ACTIONS, 3.

For easement for street, see MUNICIPAL CORPORATIONS, 1-4.

By agent, see PRINCIPAL AND AGENT, 3.

Suretyship, see PRINCIPAL AND SURETY.

Railroad right of way, see RAILROADS, 1-5.

Reformation, see REFORMATION OF INSTRUMENTS.

Specific performance, see SPECIFIC PERFORMANCE.

Sales of realty, see VENDOR AND PURCHASER.

For water, see WATERS AND WATER COURSES, 5-6.

1. **CONTRACTS — EMPLOYMENT — CERTAINTY.** A contract whereby defendant agreed that, if at any time she should desire to erect a building in any place in the cities of S. or E., she would employ the plaintiff as architect to prepare the plans and superintend the construction, is so wanting in certainty as to the terms of the employment as to be unenforcible. *Ryan v. Hanna*..... 379
2. **CONTRACTS—VALIDITY—LEGALITY OF OBJECT—RESTRAINT OF TRADE —TIME.** A covenant in a bill of sale not to engage in the retail meat business within a limited locality, for not less than two years, is an agreement not to engage in such business for two years after the date of the contract; and hence is not invalid as being without limitation as to time. *Loutzenhiser v. Peck*..... 435
3. **CONTRACTS—CONSTRUCTION—IN PARI MATERIA.** Where a written agreement refers to a right of way deed between the parties, and the deed refers to the written agreement, in recital of its consideration and purposes, the two must be considered *in pari materia*. *Tacoma Mill Co. v. Northern Pac. R. Co.*..... 187
4. **CONTRACTS—BUILDING CONTRACTS—CLAIM FOR EXTRAS — CONSTRUCTION OF CONTRACT—DECISION OF ARCHITECT—CONCLUSIVENESS—REASONABLE DIFFERENCE OF OPINIONS.** Where the contract for a building

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made the architect the arbiter or umpire for the purpose of deciding questions that might arise on the contract, his decision that a third elevator was called for by the contract and was not an extra, in case the owner exercised the option of adding four stories to the six stories started, is not fraudulent or arbitrary, but is binding on the parties, where building experts disagreed as to the proper construction of the contract in that respect, and taking the contract and plans and specifications as they were, the minds of men may honestly and reasonably differ as to whether the third elevator was required for the ten-story building or was to be considered as an extra. *Sound Construction & Engineering Co. v. Green*..... 459

5. CONTRACTS—BUILDING CONTRACTS—DEMURRAGE — WAIVER — TERMINATION OF CONTRACT. A city, upon terminating a contract for the construction of a city hall and taking over the work of completing the building, cannot claim damages under the demurrage clause, calling for \$25 per day for delay in completing the building; where the delay up to that time was waived or the fault of the city. *Garey v. Pasco*..... 382

6. SAME—BUILDING CONTRACTS—CERTIFICATES AND PARTIAL PAYMENTS —ESTOPPEL. Under a building contract providing that no certificate given or payment made during the progress of the work shall be construed as an acceptance, the city is not estopped from asserting set-offs and counterclaims by reason of certificates of the architects which were not final and partial payments made thereon. *Garey v. Pasco* 382

7. CONTRACTS — PERFORMANCE OR BREACH — DELIVERY — EVIDENCE — QUESTION FOR JURY. In an action to recover for installing an irrigation pumping plant on defendant's ranch, which provided for delivery of the machinery "on your ground," whether there was a substantial delivery is a question for the jury, where heavy machinery, the frame alone weighing 2,785 pounds, was landed from a boat on a gravel bar, near defendant's ranch; the well where it was to be installed being two hundred and fifty or three hundred feet distant up a very steep and rocky bank, and defendant could not move the machinery up to the well without risk of injuring it, and also without being considered as having accepted such delivery. *United Iron Works v. Wagner*..... 293

8. CONTRACTS—PERFORMANCE OR BREACH—FURNISHING PLANS—QUESTION FOR JURY. A contract for installing an irrigating pumping plant providing that the defendant should build the foundations after plans furnished by the plaintiff, requires intelligible and workable plans, and it is error for the court to decide, as a matter of law, that plaintiff was excused from strict performance by defendant's failure to build the foundations, where there was evidence that the only plan furnished was a mere pencil drawing or sketch

CONTRACTS—CONTINUED.

- not drawn to scale, and from which the defendant, though a carpenter and bridge builder of experience, could not complete the foundation without additional information. *United Iron Works v. Wagner* 293
9. **CONTRACTS—SUBSTANTIAL PERFORMANCE — RECOVERY — REDUCTION.** In an action for the contract price of installing an irrigating pumping plant, full performance of which was alleged to have been prevented by defendant's failure to build the foundations, it is error to allow recovery for the entire amount of the contract; since, where deviations are made from full performance, not wilfully or in bad faith, the recovery is reduced by the damages caused by such deviations, which is usually the expense of completing the contract. *United Iron Works v. Wagner*..... 293
10. **SAME—SUBSTANTIAL PERFORMANCE—QUESTION FOR JURY.** In such a case, it is error to take the case from the jury, where there was a conflict in the evidence as to whether plaintiff's failure to complete the installation was wilful or in bad faith, and as to whether the defendant was at fault in failing to build the foundation. *United Iron Works v. Wagner*..... 293
11. **SAME—SUBSTANTIAL PERFORMANCE—WAIVER — QUESTION FOR JURY.** In such a case, it is also a question for the jury whether defendant waived strict performance of the contract, where the machinery was never moved from the bar by either party, and there was testimony to the effect that defendant at numerous times requested to know when plaintiff would complete its installation, and did not consider that the machinery had been delivered to him according to the terms of the contract. *United Iron Works v. Wagner*..... 293
12. **CONTRACTS—PERFORMANCE OR BREACH—REASONABLE TIME—PAROL EVIDENCE—ADMISSIBILITY—QUESTION FOR JURY.** Where a written contract for the installation of an irrigating pumping plant specified no time for completing the work, the law implies that it shall be within a reasonable time; and while testimony that a particular time was orally agreed upon so as to permit irrigating that season is inadmissible as varying the terms of the writing, the question as to what would be a reasonable time under all the circumstances and within the contemplation of the parties is one for the jury, upon competent evidence. *United Iron Works v. Wagner*..... 293

CONTRADICTION:

Of witness, see **WITNESSES**, 3, 6-8.

CONTRIBUTORY NEGLIGENCE:

Of passenger, see **CARRIERS**, 5.

Of servant, see **MASTER AND SERVANT**, 11-15.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 17.

CONVEYANCES:

See CHATTEL MORTGAGES; DEEDS; MORTGAGES.

To officers by insolvent corporation, see CORPORATIONS, 6.

Of estate held in trust, see COURTS.

Title to unsevered crops, see CROPS.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Mortgaged property, see MORTGAGES.

Of tide and shore lands by state, see NAVIGABLE WATERS, 2-9.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.

Public service corporations, right to regulate private business, see ELECTRICITY.

Fraud in sale of corporate stock, see FRAUD, 1, 2.

Specific performance of contract for sale of stock, see SPECIFIC PERFORMANCE, 2.

Evidence of transactions with officer since deceased, see WITNESSES, 1, 2.

1. CORPORATIONS—STOCK—SALE—WARRANTY—EVIDENCE—SUFFICIENCY. A warranty that stock sold was of the value of \$235 a share is sufficiently sustained by evidence of the purchaser that defendant specifically "guaranteed" its value to him at that sum at their first interview, and at the second interview, when others were present, he consented to guarantee the stock "as he had promised;" although such other witnesses all testified only to a general warranty at the second interview; since their evidence did not contradict the plaintiff. *Peterson v. Brewer*..... 456
2. CORPORATIONS—SALE OF STOCK—TO OFFICERS—FRAUD—DUTY OF PURCHASER—DISCLOSURE OF MARKET. Upon the purchase of corporate stock by another stockholder who was an officer in the company, the latter is not bound to disclose his market or reveal a contract that was the result of a personal venture, if the sale was not for the benefit of the corporation. *Haverland v. Lane*..... 557
3. SAME—PURCHASE OF STOCK—FRAUD—EVIDENCE—SUFFICIENCY. In such a case, damages for the misrepresentations cannot be claimed by sellers of the stock who had opportunity to investigate the books of the company and received their own price, which was about its actual value and in advance of the market price, if it had a market value, and the parties dealt at arm's length. *Haverland v. Lane* 557
4. CORPORATIONS—STOCKHOLDERS—STOCK SUBSCRIPTIONS—PAYMENT IN MERCHANDISE—LIABILITY TO CREDITORS. Where but ten thousand dollars of the capital stock of a fifteen thousand dollar mercantile corporation was subscribed for, five thousand dollars being held as treasury stock, and the subscribed stock was paid for by the transfer of \$14,600 worth of merchandise, \$10,000 of which was applied on the stock subscriptions of the owner of the merchandise and the

CORPORATIONS—CONTINUED.

- other subscribers, members of his family, who gave notes to him for the amount of their subscriptions, the stock subscribed for was fully paid for, and the stockholders are not liable to creditors as upon an unpaid stock subscription. *McKay v. Garman*..... 23
5. SAME—COMMENCING BUSINESS—STOCK NOT SUBSCRIBED—LIABILITY OF OFFICERS. An officer and stockholder in a mercantile corporation is not liable to creditors from the mere fact that the company transacted business before the whole of the capital was subscribed, in violation of law, in the absence of an express statute imposing such liability; since only the state can complain thereof. *McKay v. Garman* 23
6. CORPORATIONS—CONTRACTS—REPRESENTATION — CONVEYANCE TO OFFICERS—TITLE. Where an insolvent railroad company conveyed tide lands, held under contract of purchase from the state, to its trustees, under an agreement that they should pay the installments falling due, which the company could not pay, and should hold the land, unless the company repurchased the same within three years, which it failed to do, the title vested in the trustees, as against one succeeding to all the other interests of the company with full notice of the prior conveyance. *Ritchie v. Trumbull*..... 389
7. CORPORATIONS—CONTRACTS—AFTER FORFEITURE AND RECEIVERSHIP—VOID OR VOIDABLE. Where an insolvent coal company, after its name had been stricken for failure to pay its license fees and its assets had thereupon passed to a receiver, assigned to its judgment creditor an indemnity policy indemnifying it on account of the judgment, in exchange for an attempted satisfaction of the judgment, in order to permit the creditor to sue on the policy, as though the judgment had in fact been paid, the assignment was not void but voidable, the receiver having acquiesced therein, and the indemnity company cannot set up the invalidity of the assignment. *Davies v. Maryland Casualty Co.* 571
8. CORPORATIONS—ACTIONS—CONDITION PRECEDENT — PAYMENT OF LICENSE FEE. Rem. & Bal. Code, § 3715, providing that no corporation shall commence or maintain any suit without alleging and proving that it had paid its annual license fee, being merely a revenue measure, is sufficiently complied with by payment before argument for new trial and entry of findings and decree; especially where defendant took judgment on a counterclaim which the corporation was forced to defend. *Northwest Motor Co. v. Braund*..... 593

CORRECTION:

Of verdict by court, see TRIAL, 11.

COSTS:

On granting extension of time for filing statement of facts, see APPEAL AND ERROR, 17.

COSTS—CONTINUED.

Cost of work as invalidating assessment for improvement, see MUNICIPAL CORPORATIONS, 8.

Death of surety on supersedeas bond as affecting liability for subsequent costs, see PRINCIPAL AND SURETY, 1.

1. **COSTS—ON APPEAL—REDUCTION OF JUDGMENT.** Appellant having secured a reduction of \$875 in the judgment, is entitled to costs on appeal. *Garey v. Pasco*..... 382

COUNTIES:

1. **COUNTIES—OFFICERS—VACANCIES.** Const., art. 11, § 6, providing that the board of county commissioners in each county shall fill all vacancies occurring in any county has no application to the filling of vacancies in the office of county commissioners where all three of the county commissioner's offices are vacant. *State ex rel. Gilbert v. Dimmick* 182
2. **COUNTIES — COUNTY COMMISSIONERS — VACANCIES—APPOINTMENT—POWER OF LEGISLATURE—GOVERNOR—STATUTES.** It being necessary to prevent an entire cessation of county government through the vacancy of all the offices of the county commissioners, in the absence of any constitutional provision covering such contingency, the power is necessarily lodged in the legislature; hence the governor may fill two of three such vacancies, under Rem. & Bal. Code, § 8988, providing that, when, during a recess of the legislature, a vacancy occurs in any office the appointment of which is vested in the legislature, the governor shall fill such vacancy by appointment. *State ex rel. Gilbert v. Dimmick*..... 182

COUNTY BOARD:

Vacancies, method of appointment, see COUNTIES.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.

Enforcement of attorney's lien, see ATTORNEY AND CLIENT.

Determining validity of exercise of legislative power, see CONSTITUTIONAL LAW, 2.

Deposits in court, see DEPOSITS.

Power to correct verdict, see TRIAL, 11.

1. **COURTS—PROBATE COURTS—JURISDICTION—ESTATE HELD IN TRUST—CONVEYANCES.** The probate court has jurisdiction to authorize the administratrix to convey property held in trust by the decedent, title to which was disclaimed by the estate. *Ritchie v. Trumbull*... 389

CREDIBILITY:

Of witness, see CRIMINAL LAW, 9; WITNESSES, 8.

CREDITORS:

- Of corporation, see CORPORATIONS, 4, 5, 7.
- Conveyances in fraud of, see FRAUDULENT CONVEYANCES.
- Remedies against surety, see PRINCIPAL AND SURETY, 2.

CREDITORS' SUIT:

- Remedies in cases of fraudulent conveyances, see FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

- See FALSE PRETENSES; HOMICIDE; LARCENY; RECEIVING STOLEN GOODS.
- Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
- Practicing without certificate, see PHYSICIANS AND SURGEONS, 1-3.
- Accepting earnings of prostitute, see PROSTITUTION.
- Examination of witnesses, see WITNESSES, 3-8.

1. CRIMINAL LAW—VENUE—EVIDENCE—SUFFICIENCY. The venue in a prosecution for stealing a calf on the open range is sufficiently shown, although no one was asked the direct question whether the crime was committed in the county alleged, where that fact was clearly shown and there could have been no doubt in the minds of the jury. *State v. Libby*..... 27
2. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES. In a prosecution for accepting the earnings of a prostitute, in which the prosecuting witness testified that, under agreement with the accused, a policeman, she paid to a designated person five dollars a week for protection in soliciting at a certain cafe, evidence of other prostitutes as to identical arrangements with them is not inadmissible as constituting evidence of distinct offenses, since it tends to prove a consistent general system or design evidencing a criminal intent and purpose. *State v. Schuman*..... 9
3. CRIMINAL LAW—EVIDENCE—REPUTATION. Upon the prosecution of a policeman for accepting the earnings of a prostitute, it is not error to refuse to allow a reputation witness to state what the accused's reputation was as to being a "faithful police officer," as the same was not relevant to the nature of the offense charged. *State v. Schuman* 9
3. SAME. In a prosecution of a police officer for accepting the earnings of a prostitute in which the veracity of the accused had not been called in question, evidence as to his reputation for truth and veracity is properly excluded. *State v. Schuman*..... 9
5. CRIMINAL LAW—EVIDENCE—CONFESSIONS. A voluntary confession to a police officer is admissible, although accused was not reminded that she was under arrest and not obliged to reply and that her answer could be used against her. *State v. Brownlow*..... 582

CRIMINAL LAW—CONTINUED.

6. CRIMINAL LAW—EVIDENCE—WEIGHT. Although all the state's witnesses were from the underworld and the principal witness was a thief, their credibility was for the jury. *State v. Schuman*.... 9
7. CRIMINAL LAW—TRIAL—COMMENT ON EVIDENCE. It is not an unlawful comment on the evidence for the court, in excluding expert evidence, to remark that there was no evidence in the case on which to base its admission, where such was the fact. *State v. Schuman* 9
8. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. The statement of the prosecuting attorney that a witness for the state whose name was indorsed on the information was out of the state, and if the truth were known, the accused knows of her whereabouts and why she was not present, is not so prejudicial that it was not cured by the court's immediately instructing the jury to disregard it. *State v. Cavelero*..... 364
9. CRIMINAL LAW—TRIAL—WITNESSES — CREDIBILITY — QUESTION FOR JURY. The credibility and mentality of the prosecuting witness, who positively identified the accused, is a question for the jury, notwithstanding that he was a moral pervert and associated with disreputable persons, where those matters were fully gone into at the trial. *State v. Brooks*..... 427
10. CRIMINAL LAW—TRIAL—INSTRUCTIONS—FORMER CONVICTION. It is not error in charging the jury to mention that there was evidence of a former conviction, where the jury were told that it only affected the credibility of the accused. *State v. Brownlow*..... 582
11. CRIMINAL LAW—TRIAL—CHALLENGE TO SUFFICIENCY OF EVIDENCE—SPECIFIC OBJECTIONS—NECESSITY. A general motion to take the case from the consideration of the jury only raises the question as to whether there is any evidence tending to prove the crime charged and is insufficient to support the specific objection that the evidence was insufficient to show the accused's connection with the crime, where there was ample evidence to show that the offense had been committed. *State v. Ketterman*..... 264
12. CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be predicated on instructions to which no exception was taken. *State v. Brownlow*..... 582
13. CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. Error cannot be predicated on a question to which no objection was taken. *State v. Brownlow*..... 582
14. CRIMINAL LAW — APPEAL—REVIEW—INSTRUCTIONS—REQUESTS—NECESSITY—HOMICIDE. Upon a prosecution for homicide, an instruction admittedly correct as far as it goes upon the subject of the deceased's first attack and retreat, cannot be complained of as failing to state

CRIMINAL LAW—CONTINUED.

- all that accused was entitled to on the subject of self-defense and defendant's knowledge of the retreat, where no request was made for any instruction of that nature. *State v. Hawkins*..... 449
15. **CRIMINAL LAW—APPEAL—HARMLESS ERROR.** Error in refusing to allow a reputation witness to state what the reputation of the accused was as to being "an honest good citizen" is cured by immediately allowing the witness to state what his reputation was in the community for "good citizenship." *State v. Schuman*..... 9
16. **CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS.** In a prosecution for accepting the earnings of a prostitute, through payments deposited with the accused's designated agent, in which the evidence showed that the accused was a principal in the matter, it is not prejudicial error that the court gave an instruction authorizing a conviction as an accessory, if it was found that he aided or abetted the agent in receiving the money. *State v. Schuman*..... 9

CROPS:

Liens on crops, eloinment, see **AGRICULTURE**.
 Mortgage of crops, see **CHATTEL MORTGAGES**.
 Termination of cropping lease, see **LANDLORD AND TENANT**.

1. **CROPS—GROWING CROPS—CONVEYANCE OF LAND.** The title to unsevered crops passes to the purchaser of the land upon transfer of the title to the land. *Woody v. Wagner*..... 429

CROSS-EXAMINATION:

See **WITNESSES**, 4-7.

CROSSINGS:

Collision with automobile at crossing, see **STREET RAILROADS**.

DAMAGES:

Agreement for settlement of, see **ACCORD AND SATISFACTION**.
 For negligence of adjoining landowner, see **ADJOINING LANDOWNERS**.
 For eloinment of crop lien upon, see **AGRICULTURE**.
 For injury to horses hired, see **ANIMALS**.
 Harmless error in instructing as to measure of, see **APPEAL AND ERROR**, 39.
 Harmless error in allowance of, see **APPEAL AND ERROR**, 40, 41.
 Limited liability for injury in carriage of live stock, see **CARRIERS**, 2.
 For delay in completing building, waiver, see **CONTRACTS**, 5.
 For wrongful death, see **DEATH**.
 Liability of community on breach of separate contract of husband, see **HUSBAND AND WIFE**, 4.
 Agreement by husband in satisfaction of as binding community, see **HUSBAND AND WIFE**, 5.

DAMAGES—CONTINUED.

Alleging damages in action for injunction, see **INJUNCTION**.

Adjustment of under industrial insurance act as exercise of police power, see **MASTER AND SERVANT**, 4.

Recovery under Federal employers' liability act, see **MASTER AND SERVANT**, 14, 18.

For permanent nuisance, see **NUISANCE**.

For malpractice, see **PHYSICIANS AND SURGEONS**, 7.

For violation of terms of grant for right of way, see **RAILROADS**, 5.

For breach of warranty, see **SALES**, 3.

As remedy in suit for specific performance, see **SPECIFIC PERFORMANCE**, 2.

For diversion of waters for city supply, see **WATERS AND WATER COURSES**, 2.

For breach of contract to furnish water for irrigation, see **WATERS AND WATER COURSES**, 6.

1. **DAMAGES—PERSONAL INJURIES—EARNING CAPACITY—INSTRUCTIONS.** In an action for personal injuries, an instruction authorizing recovery for "depreciation in earning capacity, if any" where plaintiff returned to work at the same wages, is not necessarily prejudicial, where the element of lessened earning capacity was not the only question in the case, the jury was not left to speculation, and there was fact to rest the verdict upon. *Jensen v. Schlenz*..... 268
2. **DAMAGES—PERSONAL INJURIES—FUTURE PAIN AND SUFFERING—INSTRUCTIONS.** In an action for personal injuries, it is correct to instruct that the jury may award damages for pain and suffering to which plaintiff will be subjected in the future. *Godley v. Gowen*. 124
3. **DAMAGES—BREACH OF CONTRACT — CONTRACTS — CERTAINTY — EVIDENCE—SUFFICIENCY.** A loss of profits in a retail meat business in a suburban district is shown with sufficient certainty by evidence that, after defendant opened his shop in the same locality contrary to his covenant, he took in twenty to twenty-five dollars a day, the plaintiff's business fell off to about the same extent, and that the profits in the business generally amount to from twenty to twenty-five per cent of the gross sales. *Loutzenhiser v. Peck*..... 435
4. **DAMAGES—BREACH OF CONTRACT — LOSS OF BUSINESS — PROFITS—EVIDENCE—ADMISSIBILITY.** Where the vendor of an established retail meat business in a suburban district covenanted not to engage in the same business within one mile of the location for the period of two years, loss of profits reasonably ascertainable may be recovered as damages within the contemplation of the parties; and evidence relating to the business done is admissible as the best evidence of damages of which the nature of the case was susceptible. *Loutzenhiser v. Peck*..... 435

DAMAGES—CONTINUED.

5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000 for personal injuries sustained by a janitor, 54 years of age, crushed in an elevator shaft, is not excessive, where the sciatic nerve was injured, resulting in partial paralysis of a leg and foot, there was a small hernia, and injury to the kidneys, and the evidence as to whether the injuries would be permanent was conflicting, making it a question for the jury. *Remsnider v. Union Savings & Trust Co.* 87
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for personal injuries, causing constant pain and weakness to a man sixty years of age, which may be permanent, will not be held excessive when not so large as to reflect passion or prejudice on the part of the jury. *Jensen v. Schlenz*..... 268

DEATH:

Of party to action ground for abatement, see **ABATEMENT AND REVIVAL**.

Of surety on supersedeas bond as affecting right of obligee to summary judgment on affirmance, see **APPEAL AND ERROR**, 9.

Harmless error in segregating damages for different beneficiaries in action for, see **APPEAL AND ERROR**, 40.

Of person struck by automobile, see **HIGHWAYS**.

Wrongful death of employee, see **MASTER AND SERVANT**, 8, 9, 18.

Of child attracted to pond of water, see **NEGLIGENCE**, 2.

Of surety on supersedeas bond, effect, see **PRINCIPAL AND SURETY**.

Admissibility of deposition as to transactions with adverse party since deceased, see **WITNESSES**, 2.

1. **DEATH—DAMAGES—EXCESSIVE VERDICT.** A verdict for \$8,500 in favor of a mother for the death of a son is not excessive, where he was a locomotive engineer earning about \$175 a month, living with his mother and furnishing \$75 a month to maintain the home kept for him by her, and had expressed his intention of not marrying as long as his mother lived. *Donaldson v. Great Northern R. Co.* 161

DEBT:

Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1.

Community or separate debt, see **HUSBAND AND WIFE**, 1, 4, 6, 7.

Exemption of proceeds of life insurance from, see **INSURANCE**, 1.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEDENTS:

Estates, see **EXECUTORS AND ADMINISTRATORS**.

Testimony as to transactions with, see **WITNESSES**, 1, 2.

DECISION:

Review of on appeal, see **APPEAL AND ERROR**, 1-3.

On appeal, see **APPEAL AND ERROR**, 42-44.

Of architect respecting disputes arising under building contract, see **ARBITRATION AND AWARD**.

Of architect as to claim for extras under building contract, see **CONTRACTS**, 4.

DECLARATIONS:

Of agent as evidence, see **PRINCIPAL AND AGENT**, 3.

DEEDS:

As color of title, see **ADVERSE POSSESSION**, 2.

Parol evidence to show intent to limit or restrict absolute grant in right of way deed, see **EVIDENCE**, 4.

Removal of cloud of outstanding deed on purchase of property by creditor at execution sale, see **FRAUDULENT CONVEYANCES**, 1.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**, 2-3.

Conveyance of mortgaged property, see **MORTGAGES**.

Notice of application for on foreclosure of delinquent assessments, see **MUNICIPAL CORPORATIONS**, 15.

For tide lands for oystering purposes, see **NAVIGABLE WATERS**, 3-9.

Railroad right of way, see **RAILROADS**, 1-5.

1. **DEEDS—CONSTRUCTION—INTENTION—UNAMBIGUOUS WORDS.** While the contract must be read as a whole and the general design must not be frustrated by allowing too much force to single words or clauses, the controlling canon for the interpretation of deeds, if unambiguous, is to ascertain the intention of the grantor from the words employed. *Tacoma Mill Co. v. Northern Pac. R. Co.*..... 187

DEFAULT:

Of vendee in payment of installments, see **VENDOR AND PURCHASER**, 2.

DEFICIENCY:

On foreclosure of mortgage, liability of grantee, see **MORTGAGES**, 2.

DELAY:

Excusable failure to file statement of facts, see **APPEAL AND ERROR**, 16, 17.

DELIVERY:

Of goods as question for jury, see **CONTRACTS**, 7.

DEMURRAGE:

For delay in completing contract, see **CONTRACTS**, 5.

DEPARTURE:

In pleading, see **PLEADING**, 2.

DEPOSITIONS:

As to transactions with adverse party since deceased, see WITNESSES, 2.

DEPOSITS:

Subject to garnishment, see GARNISHMENT.

1. DEPOSITS—SPECIAL DEPOSITS—TITLE. Where defendant, in an action to foreclose logger's liens, procured the release of the logs pending the trial by inducing a bank to make a deposit of a check with the clerk of court pursuant to Rem. & Bal. Code, § 1173, upon the representation that it had a good defense to the action and would return the check to the bank unless it was necessary for the payment of the lien judgments, the deposit was a special one, and not a loan, and did not vest the defendant with any title to the money upon its obtaining judgment defeating the liens. *Beaston v. Portland Trust & Savings Bank*..... 627

DILIGENCE:

Failure to make diligent search as ground for exclusion of secondary evidence as to contents of letter, see EVIDENCE, 1.

In application to file cross-complaint, see TRIAL, 1.

DIRECTING VERDICT:

In civil actions, see TRIAL, 12.

DISCHARGE:

From indebtedness, see ACCORD AND SATISFACTION.

From liability as surety, see PRINCIPAL AND SURETY, 1.

DISCOVERY:

Laches in bringing action after discovery of fraud, see LIMITATION OF ACTIONS, 1.

DISCRETION OF COURT:

Review of on appeal, see APPEAL AND ERROR, 22, 23.

In civil action, see TRIAL, 1, 2.

Refusal to recall witness to permit impeaching question, see WITNESSES, 3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 44.

1. DISMISSAL AND NONSUIT—JOINT TORT FEASOR—RIGHT OF CODEFENDANT. Consent to the dismissal of one or more joint tort feors is equivalent to a voluntary nonsuit, which cannot be objected to by codefendants. *Jensen v. Schlensz*..... 268

DISTRICTS:

Local improvement districts, see MUNICIPAL CORPORATIONS, 6, 7.

DIVERSION:

Of water course, see **WATERS AND WATER COURSES**, 2.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 3.

Invalid process on foreclosure of chattel lien as denial of due process of law, see **LIENS**.

EARNING CAPACITY:

Damages for loss of, see **DAMAGES**, 1.

EARNINGS:

Accepting earnings of prostitute, see **PROSTITUTION**.

EASEMENTS:

Grant of fishing rights to Indians, see **INDIANS**, 4.

For city street, see **MUNICIPAL CORPORATIONS**, 1-4.

ELECTION:

To stand on amended answer as constituting appearance, see **APPEARANCE**.

Between counts in pleading, see **PLEADING**, 1.

ELECTION OF REMEDIES:

See **LIMITATION OF ACTIONS**, 4.

1. **ELECTION OF REMEDIES—SUPERSEDEAS BOND—ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING.** The presentation of a contingent claim, pending appeal, against the estate of a surety upon a supersedeas bond on appeal and the commencement of an action thereon, does not constitute an election of remedies which would prevent entry of summary judgment on the bond by the supreme court on affirmance of the judgment; since the supreme court first acquired jurisdiction by the appeal, and another action pending is not a good plea in bar of the primary action. *Olson v. Seldovia Salmon Co.* 547

ELECTRICITY:

1. **ELECTRICITY—POWER COMPANIES—PUBLIC SERVICE CORPORATION—PRIVATE BUSINESS.** Companies furnishing electrical energy may or may not be public service corporations, since a sale of surplus power for private purposes is not an engaging in a public business. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.* 599
2. **SAME—POWER COMPANIES—PRIVATE BUSINESS—SALE OF SURPLUS POWER—RIGHT TO REGULATE.** The contracts of a public traction company by which it sells to private individuals its surplus electrical power pertain to its private business in which the state can claim no concern, and disclosures as to such contracts are not essential to an intelligent exercise of the state's function to regulate the com-

ELECTRICITY—CONTINUED.

- pany's traction business. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.*..... 599
3. **ELECTRICITY—POWER COMPANIES — PRIVATE BUSINESS — POWER TO REGULATE—POLICE POWER.** The courts will not declare the right of the state, under the police power, to regulate and control the price to be charged for electrical power sold to private individuals, in the absence of express legislative authority therefor. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.* 599
4. **SAME — POWER COMPANY — REGULATION — RATES — PRIVATE BUSINESS—POWER OF COMMISSION—STATUTES.** The public service commission is given no power to inquire into the private contracts of a public traction company whereby it sells its surplus electrical power to private individuals, by 3 Rem. & Bal. Code, § 8626-1, declaring all companies selling electricity for light, heat or power for hire, to be public service companies, subject to regulation by the public under the jurisdiction of the public service commission; since the entire context of the act, providing for equality of service, physical valuation of property "used for the public convenience in the state," and that the commission shall ascertain the probable earning capacity of each such company "under the rates now charged," relates only to such uses as the public might compel, and the act nowhere seeks to regulate or control the price to be charged to private individuals in the incidental private business of selling surplus energy; there being no clear intent to disclose or bring such private business within the police power. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.*..... 599
5. **SAME.** In such case, the "rates" falling within the scope of the act, must mean a charge to the public for a service open to all upon the same terms, and not a consideration of a private contract in which the public has no interest. *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.*..... 599

ELOIGNMENT:

Of crop liened upon, see **AGRICULTURE**.

EMINENT DOMAIN:

Power of court to correct verdict, see **TRIAL**, 11.

EMPLOYEES:

See **MASTER AND SERVANT**.

EMPLOYERS' LIABILITY ACT:

Verdict by ten jurors in action under in state court as violating Federal constitution relative to trial by jury, see **JURY**, 1.

Recovery under for injury to servant, see **MASTER AND SERVANT**, 14, 15, 18.

ENFORCEMENT:

Of attorney's lien, see ATTORNEY AND CLIENT.

EQUITABLE ASSIGNMENTS:

See ASSIGNMENTS.

EQUITY:

See ACCOUNT; FRAUDULENT CONVEYANCES; INJUNCTION; QUIETING TITLE; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.

Equitable assignment, see ASSIGNMENTS.

Jury trial in equitable actions, see JURY, 2.

ESTABLISHMENT:

Of joint rates for connecting telephone companies, see TELEGRAPHS AND TELEPHONES.

ESTATES:

Jurisdiction to authorize conveyance of estate held in trust, see COURTS.

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

To appeal, see APPEAL AND ERROR, 4.

To assert set-offs and counterclaims, see CONTRACTS, 6.

Of wife to object to agreement by husband in satisfaction of damages to property from regrade of street, see HUSBAND AND WIFE, 5.

To bring action, see LIMITATION OF ACTIONS, 1, 3.

Of city to question legality of mode of payment under contract for easement for street, see MUNICIPAL CORPORATIONS, 3.

To enjoin appropriation of waters for city supply, see WATERS AND WATER COURSES, 2.

EVIDENCE:

See ADVERSE POSSESSION, 1; FALSE PRETENSES.

To impeach certificate of acknowledgment of mortgage, see ACKNOWLEDGMENT.

To show partial failure of consideration for note, see BILLS AND NOTES, 1.

For personal injuries, see CARRIERS, 6.

In action for damages from collision of vessels, see COLLISION, 2, 3.

To show substantial delivery, see CONTRACTS, 7.

Of warranty as to value of corporate stock, see CORPORATIONS, 1.

Of fraud in purchase of stock, see CORPORATIONS, 3.

In criminal prosecutions, see CRIMINAL LAW, 1-6, 11; LARCENY.

Harmless error in rulings on, see CRIMINAL LAW, 15.

Of damage by loss of profits, see DAMAGES, 3, 4.

Fraud inducing exchange of property, see EXCHANGE OF PROPERTY.

To show fair price for property sold to pay debts of estate, see EXECUTORS AND ADMINISTRATORS, 3.

Cause of fire, see FIRES.

EVIDENCE—CONTINUED.

- Of fraud, sufficiency, see FRAUD, 3.
 - In prosecution for murder, see HOMICIDE, 1.
 - For injuries to servant in general, see MASTER AND SERVANT, 6, 9, 11-13.
 - For personal injuries, see MUNICIPAL CORPORATIONS, 16, 17.
 - To show existence of tide lands, see NAVIGABLE WATERS, 9.
 - To establish negligence, see NEGLIGENCE, 1.
 - Newly discovered, ground for new trial, see NEW TRIAL.
 - Malpractice of physician, see PHYSICIANS AND SURGEONS, 4, 5.
 - Agency, see PRINCIPAL AND AGENT, 3.
 - In prosecution for accepting earnings of prostitute, see PROSTITUTION, 2, 3.
 - Negligence in killing stock on track, see RAILROADS, 9.
 - Of fraud in instrument, see REFORMATION OF INSTRUMENTS.
 - Parol evidence to show breach of warranty, see SALES, 2.
 - Of parol agreement between relatives for gift of land, see SPECIFIC PERFORMANCE, 1.
 - For personal injuries, see STREET RAILROADS.
 - Proof of publication of summons in tax foreclosure, see TAXATION, 2.
 - Reopening case for further evidence, see TRIAL, 2.
 - Questions of fact for jury, see TRIAL, 12.
 - To establish resulting trust, see TRUSTS, 2.
 - For rescission of contract to sell land, see VENDOR AND PURCHASER, 1.
 - Obstruction of stream, see WATERS AND WATER COURSES, 1.
 - Of forgery of signature to will, see WILLS.
 - Testimony of witnesses, see WITNESSES.
1. EVIDENCE — BEST AND SECONDARY EVIDENCE — LETTERS — SEARCH—DILIGENCE. Secondary evidence as to the contents of a letter is inadmissible on the ground that no diligent search had been made for it, where the witness stated that he had short notice, had searched through his desk and did not find it, and presumed he had it in the file, and counsel asked for a continuance so that it could be produced. *Case Threshing Machine Co. v. Wiley*..... 301
 2. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a written contract for the removal of rock definitely provided what work was to be done and at what price, without fixing the time, thereby implying that it must be done within a reasonable time, it is inadmissible, as varying the terms of the contract, to show by parol an oral agreement that such time was to be given as to allow a removal and sale of the rock at a profit; hence a second cause of action pleading such oral agreement as an additional consideration for making the written agreement does not state a cause of action and is properly struck out on motion. *Smith Sand & Gravel Co. v. Corbin*..... 43
 3. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a shipping order constituted a complete contract for the sale of four million brick at \$17.25 per thousand, it is inadmissible to show by parol

EVIDENCE—CONTINUED.

that it was not a complete contract but only an order for shipping brick of a different grade, previously contracted for at \$13.75 by a written contract therefor which had been lost. *Peterson v. Denny-Renton Clay & Coal Co.*..... 141

4. **EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—INTENT.** Extrinsic evidence is not admissible to show an intent to limit or restrict the unambiguous absolute grant in a right of way deed for the company's "Bay Side extension" "for railway and similar purposes," no fraud or mistake being claimed, the parties having dealt at arm's length and the contract being drawn by competent counsel and fully considered; since all negotiations and limitations that might readily have been expressed must be considered merged in the final agreement. *Tacoma Mill Co. v. Northern Pac. R. Co.*..... 187
5. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—RIGHTS OF STRANGERS.** The rule excluding parol evidence to vary the terms of a written contract applies to strangers to the agreement in so far as they seek or assert rights based upon the contract, or originating in the contractual relation created by it. *Union Machinery & Supply Co. v. Darnell.*..... 226
6. **EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—ADDITIONAL CONSIDERATION.** Where a mortgage, complete and unambiguous in its terms, was given by a failing debtor to secure four certain notes, specifically described in the mortgage, the recital of the amount and character of the debt is invulnerable to parol attack in the absence of fraud or mistake, and it is incompetent to show by parol that, as an additional consideration for giving the mortgage, the mortgagee by a contemporaneous parol agreement undertook to pay the sum of \$1,000 upon the indebtedness of the mortgagor to a third person; since it varies the written contract by adding new terms and creating new burdens. *Union Machinery & Supply Co. v. Darnell.*.... 226
7. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY.** Parol evidence of an agreement is not objectionable as varying the terms of a written contract, where the agreement rested in parol and the writing was not contemporaneous or for the purpose of evidencing the contract, but was made a month later merely to satisfy the banker of one of the parties. *In re Crim's Estate.*..... 395

EXAMINATION:

Of witnesses in general, see WITNESSES, 3-8.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 5; CRIMINAL LAW, 12.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 15.

EXCESSIVE CLAIMS:

See **MECHANICS' LIENS**.

EXCESSIVE DAMAGES:

See **DAMAGES**, 5, 6.

For malpractice, see **PHYSICIANS AND SURGEONS**, 7.

EXCHANGE OF PROPERTY:

Delay in bringing action for rescission of contract for, see **LIMITATION OF ACTIONS**, 1.

Rescission of contract for, see **VENDOR AND PURCHASER**, 1.

1. **EXCHANGE OF PROPERTY—RESCISSION—FRAUD — EVIDENCE — SUFFICIENCY.** The owner of farm lands exchanged for an apartment house in reliance upon false representations, was defrauded and is entitled to a rescission, where it appears that she gave property of the value of \$4,000 to \$5,000 in return for an equity in the apartment house not exceeding in value \$500, and her vendee falsely represented the income from rentals, the desirability of the location, and that a railroad company was about to build a depot in the vicinity, and that he had customers for the apartment house to whom he could sell it in a few months at a price which would net the values of the property given in exchange; the gross inadequacy of price being a badge of fraud, and some of the representations relating to matters the truth of which was not readily ascertainable, and not merely "seller's praise" or matters of opinion. *Mumford v. Smith*..... 98
2. **EXCHANGE OF PROPERTY—RESCISSION—FRAUD—LACHES — EVIDENCE —SUFFICIENCY.** The rescission of an exchange of property for shares of the capital stock of a land company, for defendant's fraudulent representations as to the character and value of the company's land, located at a great distance and which could not be examined, is properly denied, where the preponderance of the evidence is to the effect that the plaintiff knew defendant had no personal knowledge of the land, that his statements were made honestly and not positively, but upon reports received from others, to whom the plaintiff was referred, and that plaintiff did not rely thereon but interviewed the other parties, officers, and stockholders, between whom and defendant there was no collusion, and acted upon information received from others rather than defendant's representations; especially where, as a director in the company, plaintiff took no steps to complete purchase of the company's lands or to rescind the contract for a long time, meanwhile refusing an offer for the company's options that would have netted him a profit, until such time as the secretary of the company absconded and embezzled the funds of the company, making the stock worth less than it would otherwise have been. *Jarvis v. Ireland*..... 286
3. **EXCHANGE OF PROPERTY — FRAUD — EVIDENCE — SUFFICIENCY.** A charge of fraud in the exchange of property, in misrepresenting the

EXCHANGE OF PROPERTY—CONTINUED.

price paid for and the value of shares of the capital stock of a land company, rescission of which is sought, is fully met and becomes immaterial where it is shown that the defendant refused *bona fide* offers for the stock equal to the represented value. *Jarvis v. Ireland* 286

4. SAME — FRAUD — RESCISSION—DECREE—RELIEF—MONEY JUDGMENT.

Where, in a rescission of an exchange of real property for fraud, a recovery in specie is precluded by the defendant's sale and mortgage of parts of the property to *bona fide* purchasers, the plaintiff is entitled to a recovery in specie of the mortgaged and unsold property, with recovery over against the defendant personally for the amount of the loss, measured by the mortgage and the value of the property sold, upon reconveying the defendant's property. *Mumford v. Smith*..... 98

EXECUTION:

Levy by creditor on property conveyed in fraud of rights, see FRAUDULENT CONVEYANCES, 1.

EXECUTORS AND ADMINISTRATORS:

Finality of order confirming probate sale, see APPEAL AND ERROR, 1.

Conveyance of property held in trust, see COURTS.

Testimony as to transactions with decedents, see WITNESSES, 1, 2.

1. EXECUTORS AND ADMINISTRATORS — PRESENTATION OF CLAIMS —

FUNERAL EXPENSES—STATUTES. A claim against an estate for the funeral expenses of the deceased must be presented for allowance or rejection within the year allowed by the statute of nonclaim, in view of the various provisions of the statute, particularly, Rem. & Bal. Code, § 1479, providing that no holder of any claim against an estate shall maintain an action thereon unless the claim shall have been first presented, § 1568, giving priority in the order of payment of debts and claims against the estate, to funeral expenses, and § 1543, whereby the party rendering such service, may, if he sees fit to do so, look directly to the administrator for payment of his claim. *Butterworth v. Bredemeyer*..... 677

2. EXECUTORS AND ADMINISTRATORS—SALES — RATIFICATION OF VOID-

ABLE SALE—REVOCATION OF LETTERS. An executor's sale of personalty, prior to the probate of a nonintervention will, fairly done to preserve the estate from forfeiture and to pay debts, is voidable merely, and not void; and the admission of the will to probate and appointment of the executor by a court of competent jurisdiction ratifies the sale, notwithstanding the probate was thereafter annulled because of testamentary incapacity. *In re Crim's Estate*..... 395

3. SAME—SALE TO PAY DEBTS—FAIR PRICE—EVIDENCE—SUFFICIENCY.

Where the only property of an estate consisted of mining stock of speculative value, pledged by decedent for a loan, for which it was

EXECUTORS AND ADMINISTRATORS—CONTINUED.

about to be forfeited, and no one else was willing to purchase the stock at any price, a sale of one-fourth of the stock for \$790, is fair, and should be confirmed, although it was represented to the purchaser that there was a prospect of selling all of the stock for \$70,000. *In re Crim's Estate*..... 395

EXEMPTIONS:

Of proceeds of life insurance from debts, see **INSURANCE**, 1.
From assessment for improvement, in consideration for easement for street, see **MUNICIPAL CORPORATIONS**, 1-4.
From taxation, special laws, see **STATUTES**.

EXPERT TESTIMONY:

To impeach witness, see **WITNESSES**, 8.

EXTENSION:

Of time for filing statement of facts, see **APPEAL AND ERROR**, 16, 17.

EXTRA WORK:

Claims for under building contract, see **CONTRACTS**, 4.
Payment to contractor for as affecting validity of assessment, see **MUNICIPAL CORPORATIONS**, 8, 9.

FALSE PRETENSES:

1. **FALSE PRETENSES — ELEMENTS OF OFFENSE — MISREPRESENTING EXISTING FACT.** To constitute grand larceny committed by color or aid of any fraudulent or false representation, under Rem. & Bal. Code, § 2601, the representation must be of an existing or past fact. *State v. Lynn* 463
2. **SAME—FALSE REPRESENTATIONS—EXISTING FACTS—EVIDENCE—SUFFICIENCY.** A charge of grand larceny by inducing the prosecuting witnesses to invest in a corporation to be organized to do a grocery business, by falsely representing that defendant "had \$4,000 in cash at the time" received from the sale of two stores in the city of S. which he would invest in the business, is not sustained where the proof merely went to show that defendant did not put more than \$225 worth of groceries into the business. *State v. Lynn*..... 463

FEEES:

Recovery of unearned license fee on revocation of saloon license, see **INTOXICATING LIQUORS**, 3.

FENCES:

Along railroad rights of way, see **RAILROADS**, 10-12.

FILING:

Statement of facts, extension of time for, see **APPEAL AND ERROR**, 16, 17.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 1, 2.

FINDINGS:

Review of on appeal, see **APPEAL AND ERROR**, 27-34.

FIRES:

1. **FIRES—NEGLIGENCE — CAUSE OF FIRE — EVIDENCE — SUFFICIENCY—CONJECTURE.** A recovery for the loss of timber alleged to have been communicated from a railroad fire on defendants' lands cannot be sustained, where the year in which the fire occurred on plaintiffs' lands rests entirely in conjecture, and in the same year of the railroad fire, other fires, not traced to that fire, broke out in the district on lands other than the defendants', and the fire on defendants' lands was not traced to the plaintiffs' lands. *Larsen v. Standard R. & Timber Co.* 447

FISH:

Conservation of as exercise of police power, see **CONSTITUTIONAL LAW**, 1.

Right of Indians to fish outside reservation, see **INDIANS**.

FORECLOSURE:

Of mortgage, see **CHATTEL MORTGAGES**, 2-4.

Of chattel lien as denial of due process of law, see **CONSTITUTIONAL LAW**, 3.

Of chattel lien, see **LIENS**.

Of delinquent assessments, see **MUNICIPAL CORPORATIONS**, 15.

Of delinquency certificate, see **TAXATION**.

FORFEITURE:

Of saloon license, see **INTOXICATING LIQUORS**, 2, 3.

Of grant of right of way, see **RAILROADS**, 2, 3.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 2.

FORGERY:

Of signature to will, see **WILLS**.

FRAUD:

See **FALSE PRETENSES**; **FRAUDULENT CONVEYANCES**.

In purchase of stock, see **CORPORATIONS**, 2, 3.

In exchange of property, see **EXCHANGE OF PROPERTY**.

Bar of action by limitation, see **LIMITATION OF ACTIONS**, 1.

Reforming contract for fraud, see **REFORMATION OF INSTRUMENTS**.

Sales of realty, see **VENDOR AND PURCHASER**, 1.

1. **FRAUD—PURCHASE OF STOCK—DECEIT AS TO BUYER.** In an action for fraud in the sale of corporate stock, concealment of the fact that the stock was bought for the account of an undisclosed buyer is

FRAUD—CONTINUED.

- immaterial, where that fact made no difference to the sellers, who were concerned only in getting a satisfactory price. *Haverland v. Lane* 557
2. **SAME—PURCHASE OF STOCK—DECEIT AS TO RECEIVERSHIP.** Fraud in the purchase of corporate stock cannot be predicated upon the representations that, unless the stock was sold to defendant, the company would be put in the hands of a receiver, where it appears that the company was insolvent or about to become so, and subject to a receivership unless the stock was secured by those who could lend it a new credit. *Haverland v. Lane*..... 557
3. **FRAUD—REPRESENTATIONS—OPINIONS.** Fraud as a defense to an action for breach of contract to buy stock is not established by evidence of representations which amount to mere opinions, and which the witness was not sure had ever been uttered. *Templeton v. Warner* 584
4. **FRAUD—PROOF—PRESUMPTIONS.** Fraud, as ground for the rescission of a contract, will not be presumed or conjectured. *Jarvis v. Ireland* 286

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION—ACTIONS.** An oral promise to pay \$1,000 of the indebtedness of the promisee to another, in consideration of a mortgage securing an indebtedness of \$4,000 due to the promisor, is an original undertaking upon a valuable consideration, and not a promise to pay the debt of another within the statute of frauds; and an action may be brought thereon directly by the person for whose benefit it was made. *Union Machinery & Supply Co. v. Darnell* 226
2. **FRAUDS, STATUTE OF—AGREEMENT AS TO REAL ESTATE—SPECIAL PARTNERSHIP—TRUSTS.** A special partnership in real property, which need not be in writing, is created, where it was orally agreed that the defendant should purchase certain property and put up the cost of platting it, and that the plaintiffs should forego their commissions, have the same surveyed and sell it, the profits to be equally divided; hence the same is not within the statute of frauds, and the principle of trust, express or resulting, is not applicable. *Smith v. Imhoff*. 418

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—REMEDIES OF CREDITORS—LEVY AND SALE—TITLE ACQUIRED—CLOUD OF OUTSTANDING DEED—REMOVAL.** A creditor may levy execution upon real property theretofore conveyed in fraud of his rights, without having an execution returned *nulla bona*, but sale thereunder does not remove the cloud of the outstanding deed, which must be done by a direct attack on the deed, alleging

FRAUDULENT CONVEYANCES—CONTINUED.

its fraudulent character and by pleading and proving that the debtor has no other property out of which he can satisfy the debt. *Crandall v. Lee*..... 115

2. **SAME—CONVEYANCE FROM HUSBAND TO WIFE—PRESUMPTIONS—QUIETING TITLE—COMPLAINT—REQUISITES.** In an action by a judgment creditor to quiet title to property purchased at execution sale, as against the wife of the judgment debtor claiming under a deed in fraud of creditors, which was a matter of record, it is not sufficient to allege that the defendants claim some interest in the property unknown to the plaintiff, on the theory that the deed from husband to wife was presumptively fraudulent; but the complaint must allege the facts as to the deed and relationship and show that plaintiff had an existing equity at the time of the transfer and that the debtor had no other property to satisfy the debt. *Crandall v. Lee*. 115

3. **SAME—CONVEYANCE FROM HUSBAND TO WIFE—PRESUMPTIONS—BURDEN OF PROOF—ATTACK—PLEADING.** A deed from a husband to a wife carries no presumption of fraud, either as a matter of substantive law or pleading, in view of Rem. & Bal. Code, § 8766, authorizing it; and to gain the advantage of Id., § 5292, placing the burden of proving the good faith of a transaction between husband and wife upon the party asserting it, one questioning a deed from husband to wife must plead facts showing that it was actually or constructively fraudulent as to creditors having an existing equity at the time of the transfer. *Crandall v. Lee*..... 115

FUNDS:

Confusion of profits of separate funds with community earnings, see **HUSBAND AND WIFE**, 2.

FUNERAL EXPENSES:

Presentment of claim for against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 1.

FUTURE PAIN:

Damages for future pain and suffering, see **DAMAGES**, 2.

GARNISHMENT:

1. **GARNISHMENT—MONEY SUBJECT—SPECIAL DEPOSIT.** A special deposit, made by a bank to enable defendant in a lien foreclosure to procure a release of the logs, is not subject to garnishment by judgment creditors of the defendant, after dismissal of the foreclosure suit, where the defendant had no title to the money. *Beaston v. Portland Trust & Savings Bank*..... 627

GIFTS:

Enforcement of parol contract for gift of land, see **SPECIFIC PERFORMANCE**, 1.

GOOD FAITH:

In transfer of property, see FRAUDULENT CONVEYANCES, 3.
In making claim of lien, see MECHANICS' LIENS.

GRANTS:

Of easement by treaty for fishing places outside reservation, see INDIANS, 4.
Right of way deed, see RAILROADS, 1-5.

GUARANTY:

See PRINCIPAL AND SURETY.

HARBOR AREA:

Assessment of for public improvement, see MUNICIPAL CORPORATIONS, 5, 12-14.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 35-41.
In criminal prosecution, see CRIMINAL LAW, 8, 15, 16.

HIGHWAYS:

1. HIGHWAYS—USE FOR TRAVEL—NEGLIGENCE. It is negligence to drive an automobile against a man standing in the highway beside his wagon, the view being unobstructed and there being ample level space in the traveled road to avoid hitting him. *Stephenson v. Parton* 653
2. SAME—INSTRUCTIONS. An instruction to that effect is not erroneous as placing the whole burden on the defendant without reference to contributory negligence; since it was the driver's duty to avoid hitting him. *Stephenson v. Parton*..... 653
3. SAME—INSTRUCTIONS—NEGLIGENCE. In an action for the wrongful death of a person struck by an automobile, an instruction to the effect that, if the deceased had turned from his vehicle, was going away from it, and was run into without negligence on his part, and if his injury was the result of carelessness or negligence on the part of the defendant, the plaintiff could recover, is correct. *Stephenson v. Parton* 653
4. SAME—INSTRUCTIONS—LAST CLEAR CHANCE. In an action for the wrongful death of a person struck by an automobile while standing in the street beside his vehicle, or stepping away from the same, where he was seen by the driver two hundred or three hundred yards away, an instruction upon the doctrine of last clear chance is not reversible error. *Stephenson v. Parton*..... 653

HOMICIDE:

Requests for instructions, necessity, see CRIMINAL LAW, 14.

1. HOMICIDE—MALICE—"PREMEDITATED DESIGN"—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. A conviction of second degree murder is

HOMICIDE—CONTINUED.

sufficiently supported by evidence of malice or "premeditated design to effect the death," within Rem. & Bal. Code, § 2392, where defendant started an affray by rushing up to the deceased and others and charged someone with cutting his hog, and on this being denied, with lying, and after being struck by the deceased, drew or produced a revolver which he might have had concealed in his hand, and shot the deceased while deceased was retreating after being requested by deceased and another not to shoot, and shot again and killed the deceased while others were trying to disarm him; especially in view of the rule that, the killing being admitted, the burden of justifying the act or reducing the crime to manslaughter is upon the accused. *State v. Hawkins*..... 449

2. HOMICIDE—SELF-DEFENSE — PROVOKING ASSAULT — FAILURE TO DESIST. One who starts a fatal affray by conduct provoking an assault, and was struck, is not justified in shooting his assailant in self-defense, after his assailant had retreated and he was requested not to shoot, and where he afterwards fired again and killed the deceased while being disarmed by others; as it was his duty to retreat or at least desist. *State v. Hawkins*..... 449

HUSBAND AND WIFE:

Conveyances between, see FRAUDULENT CONVEYANCES, 2, 3.

1. HUSBAND AND WIFE—ACTIONS AGAINST WIFE—NECESSARY PARTIES —COMMUNITY PROPERTY—LIEN OF JUDGMENT. A judgment against a wife, sued alone upon a community debt while she was living with her husband, is not a lien upon community real property standing in the name of the husband; in view of Rem. & Bal. Code, §§ 5917, 5918, giving the husband the management and control of the community property, and Id., § 181, providing that, when a married woman is made a party, her husband must be joined, unless the action concerns her separate property or homestead or is between herself and husband, or she is living separate and apart from her husband. *Conley v. Greene*..... 39
2. HUSBAND AND WIFE — COMMUNITY PROPERTY — SEPARATE FUNDS — PROFITS AND GAINS — CONFUSION WITH EARNINGS. Findings that profits and gains of separate funds were so intermingled and confused with community earnings as to make the net result, after ten years, the community property of husband and wife, are sustained, where it appears that, at about the time of their marriage, \$500 of separate funds of the wife and \$400 of separate funds of the husband were invested in nine shares of the capital stock of a lumber company, which was thereafter managed by the husband as a close corporation, and operated much as a partnership, and successfully financed at the start largely through personal loans, and by profits and gains, increasing in value in ten years twenty-fold, largely

HUSBAND AND WIFE—CONTINUED.

- through the personal efforts of the husband, who held one-half of the outstanding stock of the corporation at the time of the death of the wife under circumstances justifying the conclusion that his skill and efforts contributed much more to the profits and gains of the corporation and growth of its business than the relatively small investment at the inception of the enterprise; especially when taken in connection with the impossibility of ascertaining the true proportion of such original investment in the value of the capital stock at the time of the wife's death. *In re Buchanan's Estate*..... 172
3. HUSBAND AND WIFE—CONTRACTS OF HUSBAND—SEPARATE ESTATE—BREACH—EFFECT ON COMMUNITY—CONSIDERATION—INJUNCTION—WIFE—WHEN BOUND. Upon the sale by a husband of his separate business, a covenant not to engage in the same business in a limited locality for a limited time is binding upon the community, and precludes him from making a gift to his wife of his separate estate and setting her up in such business; the fact that he was supporting the community from the business sold constituting a sufficient consideration to the community, so that the community, himself, and his wife could be enjoined from entering upon the same business with the husband's separate funds. *Loutzenhiser v. Peck*..... 435
4. HUSBAND AND WIFE—CONTRACTS—SEPARATE CONTRACT OF HUSBAND—BREACH—INJUNCTION—DAMAGES—LIABILITY OF COMMUNITY AND WIFE. Where a husband sold his separate business from which he supported the community, covenanting not to engage in the same business within a limited locality for a limited time, and set his wife up in the same business with his separate funds, he and the community consisting of himself and wife are liable for breach of the covenant; but his wife is not separately liable for the damages, although she may be enjoined from engaging in the business with separate funds of the husband given to her for that purpose. *Loutzenhiser v. Peck*..... 435
5. HUSBAND AND WIFE—CONTRACT BY HUSBAND—DAMAGE TO COMMUNITY PROPERTY—ACCORD AND SATISFACTION—KNOWLEDGE OF WIFE—ESTOPPEL. An accord and satisfaction of damages from the regrade of a street, by the city's construction of a retaining wall, entered into by the husband alone, is sufficiently shown to have been authorized by the wife so as to bind her and the community, where it appears that they resided on the property, that the wife first discovered the work of the city, which was stopped until the agreement was made, that it was made at their residence, and the wife knowingly permitted the husband to act in the matter; in view of Rem. & Bal. Code, § 5918, giving the husband the management and control of the community real property. *Hargrave v. Colfax*..... 467
6. HUSBAND AND WIFE—COMMUNITY DEBT—SURETYSHIP. Where a husband signed a note as surety only and received no consideration, it is not a community debt and judgment against the community is

HUSBAND AND WIFE—CONTINUED.

- properly denied. *Case Threshing Machine Co. v. Wiley*..... 301
7. **HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS OF WIFE—PERSONAL INJURIES TO WIFE—ACTIONS.** A married woman, living with her husband, cannot alone make a binding contract with an attorney to prosecute an action for damages for personal injuries suffered by herself, in view of Rem. & Bal. Code, § 181, providing that a husband must be joined when the wife is a party to an action not relating to her separate estate and not between the spouses, unless she is living separate and apart from her husband, and Id., § 5917, vesting in the husband the management and control of the community personalty. *Hammond v. Jackson*..... 510
8. **HUSBAND AND WIFE—TORTS OF WIFE—LIABILITY OF COMMUNITY.** Neither the husband nor the community is liable for the tortious act of the wife in taking and damaging an automobile, in view of Rem. & Bal. Code, § 5929, providing that, for all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible except where he would be jointly responsible with her if the marriage did not exist. *Killingsworth v. Keen*..... 597
9. **SAME.** In such a case, it is immaterial that the injured party might waive the tort and sue as upon implied contract, where the wife's act was a tort to begin with. *Killingsworth v. Keen*..... 597
10. **SAME—TORTS OF WIFE—ACTIONS—PLEADING—WAIVER.** In an action for the wife's tort in taking and damaging an automobile, the allegation that the taking was for the "benefit of the marital community," is insufficient, as against demurrer, to plead the defendant's acquiescence or authorization, or to overcome the presumption that it was not for the benefit of the community, no sustaining facts being pleaded. *Killingsworth v. Keen*..... 597

IMPEACHMENT:

Of certificate of acknowledgment, see **ACKNOWLEDGMENT**.
 Of witness, see **WITNESSES**, 3, 6-8.

IMPROVEMENTS:

Liens, see **MECHANICS' LIENS**.
 Public improvements, see **MUNICIPAL CORPORATIONS**, 1-15.

INDEMNITY:

Assignment of indemnity policy to judgment creditor by insolvent company, see **CORPORATIONS**, 7.
 Indemnity insurance, see **INSURANCE**, 3, 4.
 Misconduct of counsel in showing fact of indemnity insurance, see **TRIAL**, 5.

INDIANS:

1. **INDIANS—RIGHTS AND TITLE TO SOIL—EFFECT OF TREATY.** The prior occupancy of American soil by the Indian tribes did not vest them with sovereignty or any title to the land that was ever recognized by the white race, the Indian being merely an occupant with possessory uses for subsistence, and a favored ward of the Federal government. *State v. Towessnute*..... 478
2. **SAME.** The fact of Indian sovereignty and title to the land is not admitted by a document called a "treaty" with the tribe as a "nation" in prior possession, in terms which "concede," "convey," and "relinquish," rights to the Federal government. *State v. Towessnute* 478
3. **SAME—INDIAN TREATY—CONSTRUCTION.** An Indian treaty, interpreted as a provision from a guardian of the tribe, should be construed toward benevolence to the Indians, but with due regard to the rights of the whites. *State v. Towessnute*..... 478
4. **SAME—INDIAN TREATY—RIGHT TO FISH OUTSIDE RESERVATION—EASEMENT—STATE REGULATIONS.** The Indian treaty of 1859 (12 Stat. at L. 951) securing to the Yakimas the exclusive right of taking fish in all the streams running through or bordering upon the reservation, and "also the right of taking fish at all usual and accustomed places in common with citizens of the territory," merely grants an easement for ancient fishing places outside the reservation, in common with the whites, upon equal terms, subject to state regulation and laws requiring a fishing license. *State v. Towessnute*..... 478
5. **INDIANS—INDIAN TREATIES—CONSTITUTIONAL LAW—POLICE POWERS.** An Indian treaty will be held impliedly repealed by the act admitting a state to the Union, rather than that the state be crippled in its police power. *State v. Towessnute*..... 478
6. **INDIANS—INDIAN TREATIES—STATES—ADMISSION.** An Indian treaty respecting fishing rights in a territory cannot impair the power of Congress to admit the territory to statehood upon terms of sovereignty equal to that of the other states. *State v. Towessnute*.. 478
7. **INDIANS—TREATIES—CURTAILMENT OF POLICE POWERS OF STATE.** Congress, in making provisions by an Indian treaty for fishing rights of the Indians of a territory, could not do so at the expense of the police power of the future state, notwithstanding that the Indians were more or less dependent upon the fish for subsistence. *State v. Alexis* 492

INDICTMENT AND INFORMATION:

See LARCENY; RECEIVING STOLEN GOODS.

Charging crime of accepting earnings of prostitute, see PROSTITUTION, 1.

1. **INDICTMENT AND INFORMATION—"WILFULLY AND UNLAWFULLY."** A charge that an offense was committed "wilfully and unlawfully" sufficiently charges knowledge and evil intent. *State v. Schuman*.. 9

INDUSTRIAL INSURANCE:

Application and scope of act, see **MASTER AND SERVANT**, 1-5.

INFANTS:

Premises attractive to children, see **NEGLIGENCE**, 2.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

In prosecution for practicing without certificate, see **PHYSICIANS AND SURGEONS**, 1-3.

INJUNCTION:

Enjoining breach of separate contract of husband, see **HUSBAND AND WIFE**, 3, 4.

To prevent suits as tolling statute, see **LIMITATION OF ACTIONS**, 2.

To enjoin improvement and assessment, see **MUNICIPAL CORPORATIONS**, 12-14.

Enjoining lawful operation of cement plant, see **NUISANCE**, 3.

Remedy of grantor for violation of terms of grant for right of way, see **RAILROADS**, 5.

Diversion of water, see **WATERS**, 2.

1. **INJUNCTION—ACTIONS—RELIEF—DAMAGES—PLEADING — COMPLAINT — SUFFICIENCY.** In an action for an injunction, the objection that the amount of damages was not stated in the complaint as required by Rem. & Bal. Code, § 258, cannot be urged at the trial, in the absence of demurrer or motion, where the complaint alleged the facts from which the damages flowed and that the same could not be estimated, and prayed that they be determined and for general relief. *Loutzenhiser v. Peck*..... 435

INSTRUCTIONS:

Harmless error in giving or refusing, see **APPEAL AND ERROR**, 37-39.

In criminal prosecutions, see **CRIMINAL LAW**, 10, 12, 14, 16.

In civil actions, see **TRIAL**, 7-10.

INSURANCE:

Assignment of indemnity policy to judgment creditor by insolvent company, see **CORPORATIONS**, 7.

Industrial insurance act, scope of, see **MASTER AND SERVANT**, 1-5.

Misconduct of counsel in showing fact of indemnity insurance, see **TRIAL**, 5.

1. **INSURANCE—LIFE INSURANCE—PROCEEDS — EXEMPTION FROM DEBTS — STATUTES.** Construed together as *in pari materia*, Rem. & Bal. Code, § 6158, providing that, if a policy of insurance is effected by any person on his own life, the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the

INSURANCE—CONTINUED.

terms of the policy, be entitled to its proceeds against the creditors, was intended to modify the sweeping provisions of Id., § 569, providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt; hence, to claim the exemption, the insurance must be payable to some beneficiary "other than the assured or his legal representatives." *In re Blattner's Estate* 412

2. **INSURANCE—ACCIDENTS—AUTOMOBILE INSURANCE—POLICY — LOSSES COVERED.** Under an automobile insurance policy covering losses by collision, which expressly excluded damages from the upset of the automobile unless such upset was a direct result of a collision, there can be no recovery for damages to a car which, in coming down a steep grade at a rapid rate of speed, got out of the road on a sharp turn and upset on the brink of a hill without colliding with anything and went down the hill and there collided with a tree. *Stuht v. United States Fidelity & Guaranty Co.* 93

3. **INSURANCE—INDEMNITY INSURANCE—PAYMENT OF JUDGMENT.** The execution of notes by an insolvent coal company in satisfaction of a judgment recovered by the widow of an employee, is a mere subterfuge and not a payment of the judgment, where the company was indemnified by a policy of indemnity insurance, which it at the same time assigned to the judgment creditor in consideration of the immediate cancellation and return of the notes, the intention being to enable the creditor to sue on the policy as though the assured had in fact paid the judgment. *Davies v. Maryland Casualty Co.* 571

4. **SAME—INDEMNITY INSURANCE—PREPAYMENT OF JUDGMENT—WAIVER.** Where an insurer on an indemnity policy undertook the defense of an action against the employer, it assumed a feature of a liability contract as distinguished from an indemnity contract, and waived the right to insist that the assured pay the judgment before action on the policy. *Davies v. Maryland Casualty Co.* 571

INTENT:

Of grantor in deed, see **DEEDS**.

Parol evidence to show intent to limit or restrict absolute grant in right of way deed, see **EVIDENCE**, 4.

INTEREST:

See **USURY**.

On award to reimburse for payments made to shippers for freight lost, see **COLLISION**, 4.

INTERSTATE COMMERCE:

Persons engaged in, see **COMMERCE**.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS — SALES — LICENSE — SALES IN QUANTITY.** Rem. & Bal. Code, §§ 2962, 6268, making it unlawful to sell intoxicating liquors without first obtaining a license, have no application to sales in quantity together with a hotel and saloon where the seller was closing out his business as a dealer in intoxicating liquors. *Ketler v. Murrey* 579
2. **INTOXICATING LIQUORS—LICENSES—FORFEITURE—REVIEW.** The forfeiture of a city saloon license for misconduct is a matter within the discretion of the city authorities, not reviewable by the courts, and neither the discretion nor the guilt or innocence of the licensee can be tried out in a collateral proceeding. *Fercot v. Spokane*..... 85
3. **SAME—LICENSES—FORFEITURE—RECOVERY OF FEE.** Upon the revocation of a saloon license for cause, the licensee cannot, in the absence of statute, recover the unearned portion of the license fee, nor be heard to impeach his plea of guilty to a charge of violating the law. *Fercot v. Spokane*..... 85

JOINDER:

Of parties in civil actions, see **PARTIES**.

JOINT TORT FEASORS:

Harmless error in instructing as to liability of, see **APPEAL AND ERROR**, 38.

Consent to dismissal of, see **DISMISSAL AND NONSUIT**.

JUDGES:

Conduct of, see **CRIMINAL LAW**, 7.

Comments on evidence, see **TRIAL**, 7.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Death of surety on supersedeas bond as affecting right of obligee to summary judgment on affirmance, see **APPEAL AND ERROR**, 9.

On appeal, conclusiveness, see **APPEAL AND ERROR**, 42, 43.

Affirmance of on dismissal of appeal, see **APPEAL AND ERROR**, 44.

Default for failure to appear, see **APPEARANCE**.

Foreclosure, see **CHATTEL MORTGAGES**, 3.

Relief in action for rescission, see **EXCHANGE OF PROPERTY**, 4.

Against wife sued alone upon community debt, see **HUSBAND AND WIFE**, 1.

Payment of judgment by assured under indemnity policy, see **INSURANCE**, 3, 4.

Personal judgment for deficiency on foreclosure, see **MORTGAGES**, 2.

Recitals in as to service of summons in tax foreclosure, see **TAXATION**, 3.

Conclusiveness of, see **TRIAL**, 1.

JUDGMENT—CONTINUED.

1. **JUDGMENT—NOTWITHSTANDING VERDICT — MOTION — TIME FOR.** A motion for judgment notwithstanding the verdict comes too late when not made until after the clerk has entered judgment on the verdict in compliance with Rem. & Bal. Code, § 431. *Carhonen v. Columbia & Puget Sound R. Co.*..... 104

JUDICIAL SALES:

Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 2, 3.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR, 1-3.

On dismissal of appeal, see APPEAL AND ERROR, 44.

Particular courts, see COURTS.

To levy assessment pending appeal, see MUNICIPAL CORPORATIONS. 13, 14.

JURY:

Right to jury trial, see ACCOUNT.

Questions for jury in criminal prosecutions, see CRIMINAL LAW, 6, 9.

Instructions in criminal prosecutions, see CRIMINAL LAW, 10, 12, 14, 16.

Instructions in civil actions, see TRIAL, 7-10.

Verdict in civil actions, see TRIAL, 11.

Questions for jury in civil actions, see TRIAL, 12.

1. **JURY—RIGHT TO JURY TRIAL—FEDERAL CONSTITUTION.** The seventh amendment to the Federal constitution relative to trial by jury does not apply to trials in state courts; and hence, in an action in a state court under the Federal employers' liability act, a verdict agreed to by ten jurors does not violate rights under the Federal constitution. *Donaldson v. Great Northern R. Co.*..... 161
2. **JURY—RIGHT TO JURY TRIAL—EQUITY.** Const., art. 1, § 21, providing that "the right to trial by jury shall remain inviolate" has no application to actions of equitable cognizance. *Garey v. Pasco.*..... 382

JUSTIFICATION:

Of homicide, see HOMICIDE, 1.

KNOWLEDGE:

By wife of husband's contract as binding community, see HUSBAND AND WIFE, 5.

Charging knowledge and evil intent of accused, see INDICTMENT AND INFORMATION.

LACHES:

In rescission of contract, see EXCHANGE OF PROPERTY. 2.

As bar to action for fraud, see LIMITATION OF ACTIONS. 1.

LANDLORD AND TENANT:

Mortgage of crops on leased land, see **CHATTEL MORTGAGES**, 1.

1. **LANDLORD AND TENANT—GROWING CROPS—LEASE—TERMINATION.** A cropping lease requiring surrender and delivery of possession upon a sale and the payment to the tenant of the value of growing crops, is terminated by such sale and demand for possession, with offer to credit the value of the crop. *Woody v. Wagner*..... 429

LARCENY:

See **FALSE PRETENSES**; **RECEIVING STOLEN GOODS**.

Venue of crime, see **CRIMINAL LAW**, 1.

1. **LARCENY—EVIDENCE—SUFFICIENCY.** A conviction for stealing a calf on the open range is sustained by the evidence where the defendant admitted the killing and butchering of the calf and the taking of the meat and attempted to conceal the fact, stating to the arresting officer that no one would have known about it if he had not appeared so soon, although the accused claimed that it was shot by mistake and that he intended to find and make compensation to the owner. *State v. Libby*..... 27
2. **LARCENY—INFORMATION—VARIANCE.** Upon a prosecution for stealing a calf from the open range, of unknown ownership, there is no variance as to ownership from the fact that a witness on cross-examination testified that he thought it belonged to the L.-W. Co., where he stated on redirect that he did not know who it belonged to. *State v. Libby* 27

LAST CLEAR CHANCE:

To avoid accident, see **HIGHWAYS**, 4.

LAW OF THE CASE:

See **APPEAL AND ERROR**, 42, 43.

LEASES:

See **LANDLORD AND TENANT**.

LEGISLATIVE POWER:

See **CONSTITUTIONAL LAW**, 2.

LETTERS:

Secondary evidence, see **EVIDENCE**, 1.

LEVY:

Of execution by creditor on property conveyed in fraud of rights, see **FRAUDULENT CONVEYANCES**, 1.

LICENSEE:

Injuries to licensees, see **RAILROADS**, 6-8.

LICENSES:

Payment of license fee as condition precedent to action, see **CORPORATIONS**, 8.

LICENSES—CONTINUED.

For sale of intoxicating liquors, see **INTOXICATING LIQUORS**.
Of physician, see **PHYSICIANS AND SURGEONS**, 1-3.

LIENS:

See **MECHANICS' LIENS**.

Agricultural liens, see **AGRICULTURE**.

Of attorney, see **ATTORNEY AND CLIENT**.

Mortgage, see **CHATTEL MORTGAGES**, 3, 4.

Foreclosure of chattel liens as denial of due process of law, see **CONSTITUTIONAL LAW**, 3.

Lien of judgment against wife sued alone on community debt, see **HUSBAND AND WIFE**, 1.

1. **LIENS — CHATTEL LIENS—FORECLOSURE—NOTICE—NECESSITY—DUE PROCESS OF LAW.** Under Rem. & Bal. Code, §§ 1105-1107, requiring notice of a chattel foreclosure to be personally served as in the case of a summons, and if the mortgagor cannot be found in the county, then by publication as in the case of a sale on execution, a foreclosure is void, as being without due process of law, where the sheriff's return showed no certificate either of service of the notice on the mortgagor or that he could not be found in the county. *White v. Powers* 502

LIFE INSURANCE:

See **INSURANCE**, 1.

LIMITATION OF ACTIONS:

Time for taking appeal, see **APPEAL AND ERROR**, 6-8.

1. **LIMITATION OF ACTIONS—FRAUD—DISCOVERY—EXCHANGE OF PROPERTY—RESCISSION—LACHES.** Where plaintiffs, seeking rescission of the sale to them of shares of the capital stock of a land company, on account of misrepresentations as to its value and the amount of offers received for it, did not commence action until more than three years after discovery of the fraud, the action is barred, both by the statute of limitations and equitable estoppel. *Jarvis v. Ireland* 286
2. **LIMITATION OF ACTIONS—TOLLING STATUTES—INJUNCTION TO PREVENT SUITS—APPEARANCE—PROCEEDINGS—EFFECT ON STAY—STATUTES.** Where an action was brought in the Federal court by the surety in the bond of a public contractor, to enjoin a multiplicity of suits on the bond and the transfer of funds by state officers, until the claims against the bond could all be established in one action, which claims the surety confessed a willingness to pay, and in which action the claimants appeared to prove their claims, but no injunction was issued, and the suit was finally dismissed as to all claimants whose claims against the bond were less than \$2,000, the Federal suit does not operate to toll the statute of limitations against actions on the

LIMITATION OF ACTIONS—CONTINUED.

bond, under Rem. & Bal. Code, §§ 172, and 173, providing that, if an action is stayed by injunction, the time of the continuance of the injunction shall not be a part of the time limited, and that, if an action shall be commenced within the time prescribed therefor and judgment for plaintiff be reversed on appeal, the plaintiff may commence a new action within one year thereafter; since no injunction was issued and there was no appeal from or reversal of the decree of the Federal court. *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.* 404

3. **SAME—TOLLING STATUTES — AGREEMENT — CONDITIONS.** In such a case, the surety company is not equitably estopped to set up the three-year statute of limitations against subsequent actions on the bond by the fact that, in the Federal suit, it agreed that, if the claimants would enter an appearance in the Federal court, the claims would be paid as soon as properly established as true claims against the bond; since a promise to toll the statute of limitations must be clear, definite, and unconditional; and the promise was upon the condition of establishing the claims, which condition was not performed. *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.* 404

4. **SAME — TOLLING STATUTE — AGREEMENT — ELECTION OF REMEDIES.** The voluntary appearance of the claimants in the Federal suit to avoid an injunction against their prosecution of suits on the bond in the state court, and in reliance on the establishment of their claims in the Federal suit, was an election of remedies, and not a waiver of the statute of limitations by the surety, in the absence of an express agreement to that effect. *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.* 404

LIMITATION OF LIABILITY:

Of carrier, see **CARRIERS**, 2.

LIMITATIONS:

In right of way deed, see **RAILROADS**, 2.

LIS PENDENS:

Effect on limitation of pendency of other proceedings, see **LIMITATION OF ACTIONS**, 2.

LIVE STOCK:

Carriage of, see **CARRIERS**, 1, 2.

Larceny of, see **LARCENY**.

Injuries from operation of railroads, see **RAILROADS**, 9-12.

LOANS:

See **USURY**, 3.

LOGS AND LOGGING:

Loss of timber by fire, see **FIRES**.

1. **LOGS AND LOGGING — BOOMING COMPANY — LIABILITY FOR LOSS — STATUTES.** A booming and driving company is not obligated to catch and boom all the logs that may be driven down a stream, under the statute, either prior to its amendment in 1909, when booming and driving companies were (by Laws 1889-90, p. 470, as amended by Laws 1895, p. 128 and Laws 1905, pp. 108 and 232) only required to boom logs which the owner requested to be caught or logs which came down not in charge of the owner, regardless of the original navigability of the stream; nor after its amendment, when by Rem. & Bal. Code, § 7123, tolls were authorized by a driving and booming company, operating on a stream that was theretofore navigable, for all logs which it drives or booms at the request of the owner, or without such request when commingled with other logs or which obstructed the drive, and also upon logs which are driven or floated down a stream which was not navigable prior to the company's improvement of the stream. *Dufur v. Lewis River Boom & Logging Co.* 279
2. **SAME—BOOMING COMPANY—ACTION FOR LOSS OF LOGS—PLEADING —COMPLAINT—SUFFICIENCY—LEGAL CONCLUSION.** A complaint against a booming and driving company for the loss of logs floated down the stream must allege facts to show that the plaintiff's logs reached the defendant's boom in some of the ways which, under the statute, imposed the duty to catch and boom them, since the company is not obligated to boom all logs that may be driven; and where the complaint is silent as to the facts, the mere allegation that "it became the duty of defendant to catch and hold" the logs is a mere conclusion of law and insufficient to state a cause of action. *Dufur v. Lewis River Boom & Logging Co.* 279

MALICE:

Of accused, see **HOMICIDE**, 1.

MALPRACTICE:

See **PHYSICIANS AND SURGEONS**, 4-7.

Right of workman compensated by industrial insurance act to maintain action for, see **MASTER AND SERVANT**, 3.

MANSLAUGHTER:

See **HOMICIDE**.

MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Employees engaged in interstate commerce, see **COMMERCE**.

Liens for labor and materials, see **MECHANICS' LIENS**.

MASTER AND SERVANT—CONTINUED.

1. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION — EXTRA HAZARDOUS EMPLOYMENTS — DANGEROUS PLACE — "WORKSHOP." A janitor in an office building, engaged in cleaning the walls of an elevator shaft wherein an elevator was operated by electrical power, is not engaged in "extra hazardous work" within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, §§ 6604-2 and 6604-3, providing compensation for injuries received in employments recognized as "inherently and constantly dangerous" and enumerating certain occupations as such, in which enumeration is included "workshop," defined as a "room or place wherein power-driven machinery is employed;" since the place was not a "workshop" and it is not provided that employment in every place wherein such machinery is used is impressed with an extra hazardous character. *Remsnider v. Union Savings & Trust Co.*..... 87
2. SAME — WORKMEN'S COMPENSATION ACT — EXTRA HAZARDOUS EMPLOYMENTS—STATUTES. The work of a janitor in cleaning the walls of an elevator shaft in an office building is not "extra hazardous" within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, by reason of the clause in § 6604-2, providing that, if there be or arise any extra hazardous occupation or work other than those enumerated, it shall come under the act and its rate of contribution to the accident fund shall, until fixed by legislation, be determined by the industrial insurance department, where such employment has not "come to be, and to be recognized as being, inherently and constantly dangerous" as provided in such section, nor enumerated in any of the schedules of extra hazardous employments of § 6604-3, nor in any of the classifications of § 6604-4, nor classified by the department as extra hazardous nor its rate of contribution fixed as provided in such clause of § 6604-2. *Remsnider v. Union Savings & Trust Co.*..... 87
3. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—EFFECT—ABOLITION OF CIVIL ACTIONS—MALPRACTICE IN FURNISHING MEDICAL ATTENDANCE. Under the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, compensating injured workmen in extra hazardous employments without reference to the manner of the injuries, and declaring that, "all phases of the premises are withdrawn from private controversy," "and to that end all civil actions and civil causes of action for such personal injuries . . . are hereby abolished, except as provided in the act," and providing for readjustment of compensation in case of aggravation of disability, an injured workman compensated by the act cannot maintain an action for malpractice aggravating his injuries, against his master and the physician provided by the master to furnish medical attendance to employees in consideration of monthly deductions from their wages; since the injury by such malpractice is proximately attributable to the original hurt and is received in the course

MASTER AND SERVANT—CONTINUED.

- of the employment and so within the benevolent design of the statute providing compensation. *Ross v. Erickson Construction Co.*..... 634
4. SAME—WORKMEN'S COMPENSATION ACT—POLICE POWER. The ad-measurement of damages in money for injuries to employees is within the police power of the state, and the courts will not restrain or enlarge upon the exercise of that power, or substitute its judgment for that of the legislature upon any question of fact arising under it. *Ross v. Erickson Construction Co.*..... 634
5. SAME—COMPENSATION—EFFECT ON ACCIDENT INSURANCE. The work-men's compensation act providing compensation to injured employees in extra hazardous employments does not bar a recovery upon an accident policy, since the same rests upon a contract independent of the statute. *Ross v. Erickson Construction Co.*..... 634
6. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—REVERSED ENGINE—FAILURE TO KEEP LOOKOUT—EVIDENCE—SUFFICIENCY. A find-ing of negligence, as a matter of fact, in running down a track in-spector, is sustained by the evidence, where it appears that he was struck while alighting from a speeder by a lone engine backing around a curve, that the rules of the company required a forward lookout on the end car of backing trains and provided that an en-gine without cars in service on the road shall be considered a train, that no forward lookout was placed on the tender, and that the fire-man and also the brakeman, who was looking ahead from the cab window, had an unobstructed view of the track for 1,000 feet, that the fireman first discovered the speeder when within 150 feet and gave the signal to stop, and that the brakeman first discovered it when within 300 feet, but gave no signal to stop, and that the en-gineer stopped the engine when within about 300 feet after receiving the fireman's signal. *Anest v. Columbia & Puget Sound R. Co.*... 609
7. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY. In an action by a servant for injuries sustained in crank-ing an automobile, the negligence of the defendant is a question for the jury, where it appears that he advanced the spark while plain-tiff was turning the crank, which the defendant knew or should have known would have a tendency to cause the engine to backfire and kick back. *Godley v. Gowen*..... 124
8. SAME—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for the death of an engineer through the explosion of a locomotive boiler, it is for the jury to determine whether the railroad company was guilty of negligence in converting a coal burning locomotive into an oil burner without changing button head bolts or using fusible plugs, and as to the presence or absence of scale on the crown sheet, where there was evidence that button head bolts had a tendency to become overheated by an oil flame, and taper heads were used on oil

MASTER AND SERVANT—CONTINUED.

- burners, and that fusible plugs were a means of preventing explosions. *Donaldson v. Great Northern R. Co.*..... 161
9. MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE — PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY. The evidence of a dozen experts who stated positively that the conditions after a boiler explosion showed conclusively that the explosion was caused by low water does not conclusively establish the same as a scientific fact, where their statements were only opinions drawn from previous experience; and the question is one for the jury where the fireman, the only one in a position to know positively whether there was water in the boiler, testified that the water glass showed sufficient water to prevent an explosion. *Donaldson v. Great Northern R. Co.*..... 161
10. SAME—ASSUMPTION OF RISKS—NEGLIGENT OPERATION OF TRAINS. A track inspector on a speeder does not assume the risk of engines being run over the road reversed without proper lookout or warning being given to avoid running him down. *Anest v. Columbia & Puget Sound R. Co.* 609
11. MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE — VIOLATION OF RULES—EVIDENCE—SUFFICIENCY. It is a question for the jury to determine whether a section foreman was guilty of negligence in entering a curved cut with a hand car at the rate of twenty miles an hour, under the company's rule to approach with great caution, keeping a lookout for trains, and sending a man ahead if the view is not clear, where it appears that the curve was not a sharp one, and the cut was not so deep as to obscure the view of the smoke of an approaching train, and within the curve there was a view from the center of the track for one thousand feet ahead. *Papoutsikis v. Spokane, Portland & Seattle R. Co.*..... 1
12. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The fact that a section man was hurt when a hand car was stopped to avoid collision with a train is not evidence of negligence on the part of the foreman in charge of the car, especially where there was evidence that he jumped off needlessly and was the only man injured; since the jury might have found that he alone was negligent. *Papoutsikis v. Spokane, Portland & Seattle R. Co.*... 1
13. SAME—CONTRIBUTORY NEGLIGENCE — TRACK INSPECTOR—EVIDENCE—SUFFICIENCY. A track inspector whose duty it is to look out for the safety of the trains as well as himself, and who allowed himself to be overtaken on a curve in a situation where he could not stop in time to get off the track, was guilty of contributory negligence. *Anest v. Columbia & Puget Sound R. Co.*..... 609
14. SAME—CONTRIBUTORY NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE. Under the Federal employers' liability act, the contributory negligence of the plaintiff does not bar a

MASTER AND SERVANT—CONTINUED.

- recovery, but reduces the amount proportionally as the negligence of the defendant and of the plaintiff contribute to the causation of the injury. *Anest v. Columbia & Puget Sound R. Co.*..... 609
15. SAME. The negligence of a track inspector on a speeder, who failed to keep a lookout for a train following until too late to extricate himself, contributed to the causation equally with the negligence of the defendant's train crew on a lone engine in failing to discover him on the track in time to avoid running him down. *Anest v. Columbia & Puget Sound R. Co.*..... 609
16. MASTER AND SERVANT—INJURY TO SERVANT—CHOICE OF METHODS—INSTRUCTIONS. In an action by a servant for injuries sustained in cranking an automobile, an instruction as to the duty of the plaintiff, in case there was a safe and an unsafe method of performing the act, is inapplicable where plaintiff was not instructed as to the proper manner and did not know that one way was safer than another. *Godley v. Gowen*..... 124
17. SAME—INJURY TO SERVANT—INSTRUCTIONS. In an action by a servant for injuries sustained in cranking an automobile, upon an issue as to whether defendant ordered the plaintiff to crank the car, or whether he did so without defendant's knowledge and contrary to orders, an instruction as to the duty of the defendant as to warning plaintiff of the dangers in case he ordered or "permitted" the plaintiff to do so, is not prejudicially erroneous in the inapt use of the word "permitted," where there was in the case no idea of permission except as inferred from the order to crank the car, and it must have been so understood. *Godley v. Gowen*..... 124
18. SAME—FEDERAL EMPLOYERS' LIABILITY ACT—PROPORTIONATE RECOVERY. In an action for wrongful death, under the Federal employers' liability act, the defendant is not concerned with and cannot complain of the apportionment of the judgment between the widow and minor children of the deceased. *Anest v. Columbia & Puget Sound R. Co.*..... 609

MEASURE OF DAMAGES:

See DAMAGES, 5, 6.

For permanent nuisance, see NUISANCE, 2.

For breach of contract to furnish water for irrigation, see WATERS AND WATER COURSES, 6.

MECHANICS' LIENS:

1. MECHANICS' LIENS—CLAIM—EXCESSIVENESS—BAD FAITH. A mechanics' lien must be made in good faith, and is violated by wilful excess, where it appears that the claimant included a \$300 indemnity deposit not subject to lien and other foreign items, making it twice the amount that he could honestly have thought himself entitled to, and filed the same after an award of arbitrators against him, which he had invoked but refused to adopt. *Knibb v. Mortensen*..... 595

MERGER:

In deed, of promise to pay mortgage debt, see **MORTGAGES**, 1.

METHOD OF WORK:

Duty of employee to choose safe method, instructions, see **MASTER AND SERVANT**, 16.

MISREPRESENTATION:

See **FALSE PRETENSES**; **FRAUD**, 2, 3.

As inducing exchange of property, see **EXCHANGE OF PROPERTY**.

MONEY:

Subject to garnishment, see **GARNISHMENT**.

MORTGAGES:

Impeachment of certificate of acknowledgment, see **ACKNOWLEDGMENT**.

Personal property, see **CHATTEL MORTGAGES**.

1. **MORTGAGES—ASSUMPTION OF MORTGAGE—DEED TO AGENT—EFFECT—MERGER BY DEED.** Where mortgaged premises were traded by the mortgagors to one who assumed payment of the mortgage, and deeded to a bank as an agent, the bank is not liable on the assumption of the mortgage from the fact that the deed was taken in its name, where it did not agree to assume the mortgage; since such a promise is not merged in the deed, but is independent of it. *Painter v. Kennedy* 275
2. **MORTGAGES — ASSUMPTION — DEFICIENCY JUDGMENT — LIABILITY OF GRANTEE—DEEDS—COVENANTS.** A deed of mortgaged premises, made subject to liens generally, and subject to a particular mortgage which was described and which the grantee assumed to pay, does not render the grantee liable to a deficiency judgment upon another and prior mortgage, as a vendee is liable on such a covenant only where it is clear that he intended to pay a lien or indebtedness. *Chaffee v. Hawkins*..... 130

MOTIONS:

To strike attorney's lien, see **ATTORNEY AND CLIENT**, 2.

For judgment *non obstante*, time for, see **JUDGMENT**.

MUNICIPAL CORPORATIONS:

Accord and satisfaction of damages from regrade of street, see **ACCORD AND SATISFACTION**.

Payment of claims against city under defaulted contract as constituting equitable assignment, see **ASSIGNMENTS**.

Agreement by husband in satisfaction of damages from regrade of street as binding community, see **HUSBAND AND WIFE**, 5.

Remedies of landowner for injury from construction of pipe line for city water supply, see **WATERS AND WATER COURSES**, 2.

Injuries from city water service, see **WATERS AND WATER COURSES**, 3.

MUNICIPAL CORPORATIONS—CONTINUED.

1. MUNICIPAL CORPORATIONS — STREETS — CONTRACT FOR EASEMENT — "GRADING AND OPENING." A contract for an easement for a street in consideration of the city's agreeing to refund any grade tax paid by the abutting owner for "opening, grading or improving any part of a street, excepting sidewalks," contemplates more than a mere original opening for travel, which accordingly did not discharge the obligation of the city; but entitles the owner to reimbursement for assessments subsequently made for the establishment of a permanent grade, such as embankments, cuts and fills. *Washington Water Power Co. v. Spokane*..... 149
2. SAME—"IMPROVEMENTS"—"PAVING." Such a contract does not contemplate refunds for paving as an "improvement," where there was but little paving in the city at the time the contract was made; since "improvement" is a relative term, to be construed in conjunction with "opening" and "paving," and as incidental thereto. *Washington Water Power Co. v. Spokane*..... 149
3. SAME—POWERS—ACQUISITION OF LAND—PAYMENT—REFUNDS—EXEMPTION FROM ASSESSMENTS—ESTOPPEL. Under Rem. & Bal. Code, § 7507, subd. 6, authorizing a city of the first class to purchase private property for public purposes, a city that did not at the time have the right of eminent domain may purchase an easement for a highway in consideration of agreeing to reimburse the owner by the repayment of any assessments against abutting property for opening, grading or improving the street; and after receiving the benefits, the city is estopped to question the legality of the mode of payment. *Washington Water Power Co. v. Spokane*..... 149
4. SAME—ACQUISITION OF LAND—PAYMENT—REFUNDS OF ASSESSMENT — CONTRACTORS—COVENANTS—RIGHTS OF SUCCESSORS. Such a contract inures to the benefit of the grantor's successors, especially where the grantor covenanted that it would build all structures on its land (an island) of fireproof materials and expressly extended the covenant to its assigns, in return for which the city covenanted to build approaches to the island, making the latter covenant of special benefit to the grantor and its assigns. *Washington Water Power Co. v. Spokane* 149
5. SAME—ASSESSMENTS—VALIDITY — SUBSEQUENT STATUTES. The illegal assessment of leased harbor area, which was not at the time assessable, is not validated by the subsequent enactment of Laws 1915, p. 363, providing that all leasehold rights in or to harbor areas in cities and towns are subject to assessment for local improvements. *North American Lumber Co. v. Blaine*..... 366
6. SAME—PUBLIC IMPROVEMENTS—ASSESSMENT DISTRICTS — ENLARGEMENT—STATUTES. If a sewer assessment district does not include all the property susceptible of sewerage or drainage through the contemplated sewer, as required by 3 Rem. & Bal. Code, § 7897-15, the

MUNICIPAL CORPORATIONS—CONTINUED.

city could, by proper proceedings, enlarge the district by including the omitted property; and especially so, after a reassessment had been ordered under 3 Id., §§ 7892-42, 7892-43, requiring the reassessment to be made upon all property specially benefited, whether or not included in the original assessment district; provided the assessment does not exceed the actual cost and expense of the improvement. *Triangle Traders v. Bremerton*..... 214

7. SAME—ASSESSMENTS—DISTRICTS—APPORTIONMENT—VALIDITY. An assessment for a trunk sewer must have the boundaries of the district prescribed by ordinance, and the levy upon property between the termini of the improvement back to the middle of the block must be limited to the reasonable cost of a local sewer and its appurtenances, the remainder of the cost to be distributed over all the property in the district in accordance with special benefits in proportion to area, as expressly required by 3 Rem. & Bal. Code, §§ 7892-15 and 7892-16. *Triangle Traders v. Bremerton*..... 214
8. SAME—PUBLIC IMPROVEMENTS—COST OF WORK—EXTRAS—SETTLEMENT. The invalidity of a sewer assessment cannot be urged on the ground of excessiveness, arising through a settlement with the contractor allowing more than the contract price on the unit basis agreed upon, where the excess came through necessary changes entitling the contractor to extra compensation under the contract. *Triangle Traders v. Bremerton*..... 214
9. SAME—SETTLEMENT—CONCLUSIVENESS. A settlement allowing a contractor for sewer construction extra compensation on account of changes in the work, pursuant to the terms of the contract, is conclusive upon property owners assessed for the costs, in the absence of allegation or proof of fraud or collusion. *Triangle Traders v. Bremerton* 214
10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REASSESSMENTS—AUTHORITY—STATUTES. Where confirmation of a sewer assessment was denied on appeal and the assessment set aside for failure to comply with 3 Rem. & Bal. Code, §§ 7892-10, 7892-15, 7892-16, in various particulars, the court may order the city council to levy a reassessment, notwithstanding some of the errors made were jurisdictional, under 3 Id., § 7892-42, providing that the city council shall make a reassessment whenever the original has for any cause been set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court. *Triangle Traders v. Bremerton* 214
11. SAME—PUBLIC IMPROVEMENTS—ASSESSMENTS—ORDINANCES. Under 3 Rem. & Bal. Code, § 7892-43 providing that a city shall proceed to make a reassessment by "passing an ordinance ordering the same," a reassessment authorized by resolution only is invalid. *Triangle Traders v. Bremerton* 214

MUNICIPAL CORPORATIONS—CONTINUED.

12. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—INJUNCTION—INTEREST OF PARTIES. A landowner, bringing suit in its own behalf to enjoin the assessment of its tide lands, cannot complain of the assessment of other tide lands in which it has no interest. *North American Lumber Co. v. Blaine*..... 366
13. SAME—INJUNCTION—ASSESSMENTS — PENDING APPEAL — JURISDICTION. Irregularity in including harbor area, which was not assessable, in an improvement district, does not deprive the city of jurisdiction to proceed with the improvement and assess tide lands that were legally assessable; hence the fact that the lessee of harbor area was seeking an injunction by appeal from a judgment of dismissal, does not deprive the city of jurisdiction *pendente lite* to proceed to assess tide lands owned by plaintiff. *North American Lumber Co. v. Blaine*..... 366
14. SAME—PUBLIC IMPROVEMENT—ASSESSMENTS—PENDING APPEAL—EFFECT OF REVERSAL—FAILURE TO OBJECT—INJUNCTION—JUDGMENT ON REMAND. Where the lessee of harbor area sought, by appeal from judgment of dismissal, to enjoin an improvement and the assessment of leased harbor area that was not assessable, as well as tide lands owned by it which were assessable, and pending the appeal and while no injunction was in force, the city completed the improvement and levied the assessment upon due notice, upon reversal of the judgment of dismissal and remand with instructions to “enjoin the improvement,” the plaintiff may be entitled to judgment on remand cancelling the assessment on the harbor area, as to which the city had no jurisdiction of the subject-matter, upon the theory that the city proceeded *pendente lite* at its peril; but plaintiff is not entitled to a cancellation of the assessment upon its tide lands, as to which the city had jurisdiction to proceed, where plaintiff failed to file timely objections to the assessment roll or give notice of appeal, as required by 3 Rem. & Bal. Code, § 7892-23, providing that confirmation shall be final and conclusive in such case. *North American Lumber Co. v. Blaine*..... 366
15. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—DELINQUENT ASSESSMENTS—SUMMARY FORECLOSURE—DEED—REDEMPTION — NOTICE TO “OWNER.” There must be strict compliance with Rem. & Bal. Code, § 7808, providing, upon the summary sale of premises for delinquent local improvement assessments, that the notice of application for a deed be served personally upon the “owner,” which means the real owner of the property, unless something has been done to work an estoppel; hence notice by publication, to the holder of the record title under an absolute deed intended as a mortgage is not sufficient to cut off the owner’s right of redemption, where she had been in possession for more than ten years, was the record owner when the assessments were levied, her name appeared on the assessment rolls,

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and she lived in the immediate vicinity and could have been found if diligence had been used. *Smith v. Craver*..... 243

16. MUNICIPAL CORPORATIONS—STREETS—INJURY TO TRAVELER—OBSTRUCTIONS—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. Whether the negligence of the city, in leaving a pile of gravel and building stone near the center of a road without lights at night, was the proximate cause of plaintiff's injuries, when she was thrown from her horse onto the pile, does not rest entirely in speculation or conjecture, and is a question for the jury, where witnesses heard the horse's feet strike the gravel or stone and plaintiff's simultaneous outcry, and immediately afterwards found her unconscious on the pile, in such a position as to indicate almost positively that the horse had stumbled on the pile or suddenly turned so as to throw the plaintiff off. *Woodworth v. Dayton*..... 444
17. MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian in attempting to use a street which was in process of construction, on a dark night, is for the jury, where it appears that the contractor had but recently taken possession of the street, part of which he occupied, and had removed one of two wide planks constituting a narrow sidewalk elevated above the surface of the ground, without putting up any barrier, lights or warning, that the plaintiff was not aware that the plank had been removed and could not see on account of the darkness, that there were no barriers to indicate that the street had been closed to travel, and the testimony conflicted as to whether red lights were put up at the nearby street intersection at which plaintiff entered upon the street. *Welch v. Petley*..... 254

MURDER:

See HOMICIDE.

NAMES:

Of owners in notice of foreclosure suit, see TAXATION, 1.

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—SHORE LANDS—TITLE OF STATE. Shore lands on a navigable lake between ordinary high water and ordinary low water belong to the state, where they were unpatented at the time of the adoption of the state constitution. *Kalez v. Spokane Valley Land & Water Co.*..... 514
2. NAVIGABLE WATERS—SHORE LANDS—APPROPRIATION AND SALE—PRIORITY OF RIGHTS. Where state shore lands on a navigable lake were, under authority of the state, appropriated for irrigation purposes, a subsequent purchaser from the state takes with notice and

NAVIGABLE WATERS—CONTINUED.

subject to the appropriator's right to use them for purposes of irrigation by raising the lake to a higher level during the dry season. *Kalez v. Spokane Valley Land & Water Co.*..... 514

3. NAVIGABLE WATERS—LANDS UNDER WATERS—"TIDE LANDS"—DEEDS—LAND CONVEYED. Under the act of 1897, 2 Rem. & Bal. Code, § 6641, defining tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, excepting oyster lands, a state deed of tide lands conveys title only to the line of mean low tide; as the deed is limited by the express terms of the statute. *State v. Scott*..... 63
4. SAME. Such deed did not convey any title to oyster lands, therefore deeded by the state for oystering purposes under the provisions of the Callow act, Rem. & Bal. Code, §§ 6806 and 6807. *State v. Scott*..... 63
5. SAME—TIDE LANDS—DEEDS—"FRONTING" OR "ADJOINING" TIDE LANDS. Under the act of 1911, 3 Rem. & Bal. Code, § 6641, defining tide lands as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, excepting oyster reserves and lands in front of certain cities, which act extended tide lands which theretofore stopped at mean low tide, a state deed of tide lands in front of described upland tracts carries title to all tide lands to the line of extreme low tide, save those excepted; hence, it includes tide lands in front of the upland lots beyond intervening oyster lands sold to oyster growers, although it is not "adjoining" the lots by reason of the intervening oyster lands. *State v. Scott*..... 63
6. SAME—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE—"OWNERS OF SECOND-CLASS TIDE LANDS"—STATUTES. Grantees of state tide lands for oystering purposes, in deeds issued under the provisions of the Callow act, Rem. & Bal. Code, §§ 6806 and 6807, do not take fee simple title and are not owners of tide lands "theretofore sold or conveyed," within the meaning of the act of 1911, 3 Rem. & Bal. Code, § 6641-1, which granted to owners of second-class tide lands "heretofore sold or conveyed" the preference right for ninety days to purchase all tide lands to the line of mean low tide in front of second-class tide lands theretofore sold; a fee simple title being essential to such preference right. *State v. Scott*..... 63
7. SAME—"TIDE LANDS"—LANDS INCLUDED—STATUTES—CONSTRUCTION. In view of the Callow act, Rem. & Bal. Code, §§ 6808 to 6818, passed for the encouragement and protection of deep-sea oyster culture and making provision for the leasing of lands lying below the line of extreme low tide for deep-sea oyster planting, at a time when the act defining tide lands limited the same to the line of mean low tide and excepted oyster lands, the act of 1911, 3 Rem. & Bal. Code,

NAVIGABLE WATERS—CONTINUED.

§ 6641-1, redefining tide lands so as to extend the same to the line of extreme low tide, excepting "oyster reserves," must be construed as intending to adopt, as the line of extreme low tide, the line separating tide lands from land so continuously covered with water that it might be leased for deep-sea oyster culture; in view of the policy of the state to encourage such culture and especially where the question arises in the construction of a state deed of tide lands, which is to be construed, in case of doubt, most strongly against the grantee. *State v. Scott*..... 63

8. SAME—"TIDE LANDS"—"MEAN LOW TIDE" AND "MEAN LOWER LOW TIDE." On Puget Sound, where there are two high and two low tides each day, the alternate high and low being unequal; "mean low tide" signifies the average level of the low tides including both the long and short run out; while "mean lower low tide" signifies the mean level of the daily extreme low tides. *State v. Scott*.. 63

9. SAME—TIDE LANDS — DEEDS — LANDS INCLUDED — "EXTREME LOW TIDE"—EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain findings that lands in front of abutting uplands, known as the "pothole," and the bed of the channel leading thereto, were above "extreme low tide," where it appeared from soundings taken by an engineer, upon a proper plan, during short periods in July and the following January, that the bottom of the pothole was from one to seven feet lower than the arbitrary plane adopted by the United States Geodetic Survey and the Department of Commerce as the lowest plane of tide in Puget Sound recognized by that department and on which its tide tables and charts are based, and the engineer criticising such soundings (because not taken over a sufficiently long period of time) admitted that the bottom of the pothole was about a foot below extreme low tide and the channel a foot above; especially where witnesses living in the vicinity for a great many years testified that the lowest tides always left from one to two feet of water in the pothole proper and from four to six inches in the channel, leaving nothing exposed save insignificant portions around the border; hence the title to the pothole and channel did not pass under a state deed of all tide lands "in front" of the abutting upland, limited by statute to the line of "extreme low tide." *State v. Scott* 63

NECESSITY:

Of abstract of record, see APPEAL AND ERROR, 12, 14.

For bill of exceptions or statement of facts, see APPEAL AND ERROR, 15.

For objections on challenge to sufficiency of evidence, see CRIMINAL LAW, 11.

Notice of foreclosure of chattel lien, see LIENS.

NEGLIGENCE:

Of builder on adjoining land, see **ADJOINING LANDOWNERS**.

In use of hired horses, see **ANIMALS**.

Of carrier, see **CARRIERS**.

Causing collision of vessels, see **COLLISION**.

Measure of damages, see **DAMAGES**, 5, 6.

Causing death, see **DEATH**.

Cause of loss from fire, see **FIRES**.

Of driver of automobile in striking person on highway, see **HIGHWAYS**.

Loss of logs by boom company, see **LOGS AND LOGGING**.

Of employer, see **MASTER AND SERVANT**.

Contributory negligence of servant as question for jury, see **MASTER AND SERVANT**, 11.

Cause of personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 16, 17.

In treating patient, see **PHYSICIANS AND SURGEONS**, 4-7.

Of agent, see **PRINCIPAL AND AGENT**, 1.

In operation of trains, see **RAILROADS**, 6-12.

Collision between automobile and street car, see **STREET RAILROADS**.

Of city in installing defective water meter, see **WATERS AND WATER COURSES**, 3.

1. **NEGLIGENCE — PRESUMPTIONS — CIRCUMSTANTIAL EVIDENCE.** While negligence is never presumed, it may be established by circumstantial evidence; hence an instruction thereon may be warranted, although no witness testified directly as to the fact. *Jensen v. Schlenz*.. 268
2. **NEGLIGENCE—DANGEROUS PREMISES—THINGS ATTRACTIVE TO CHILDREN—PONDS.** Under the tendency to limit, rather than extend, the doctrine of the turntable cases, a pond is not such an agency attractive to children as will probably result in injury to those attracted to it; hence a railroad company is not liable for the death by drowning of a child of tender years attracted to a pond of water impounded on its premises by its grade. *Barnhart v. Chicago, Milwaukee & St. Paul R. Co.*..... 304

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see **NEW TRIAL**.

NEW TRIAL:

Review of rulings on motion for, see **APPEAL AND ERROR**, 21-23.

Striking cause of action, see **PLEADING**, 4.

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** A new trial for newly discovered evidence is properly denied where it merely related to

NEW TRIAL—CONTINUED.

the credibility of the prosecuting witness, which had been fully gone into at the trial, and was simply cumulative upon that point.
State v. Brooks..... 427

NONSUIT:

See DISMISSAL AND NONSUIT.

NOTARIES:

Impeachment of certificate of acknowledgment of mortgage, see
 ACKNOWLEDGMENT.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 7, 8.
 To assignee of partial failure of consideration for note, see BILLS
 AND NOTES, 2.
 Injury to live stock by carrier, see CARRIERS, 1.
 Of foreclosure of chattel lien as denial of due process of law, see
 CONSTITUTIONAL LAW, 3.
 Foreclosure of chattel lien, see LIENS.
 To owner on foreclosure of delinquent assessments, see MUNICIPAL
 CORPORATIONS, 15.
 Of claim against bond of contractor on public work, see STATES.
 Tax foreclosure suit, see TAXATION, 1.

NUISANCE:

1. NUISANCES—PERMANENT NUISANCE—DEFINITION—LAWFUL BUSINESS—NUISANCE PER SE—INSTRUCTIONS—DAMAGES. An instruction correctly defining what would amount to a permanent nuisance to adjoining property through the operation of a lawful business upon defendant's property, and permitting recovery therefor as a matter of law, is not necessarily erroneous in inappropriately defining the same as a nuisance *per se* when a lawful business is never a nuisance *per se*; since the operation of a lawful business may become a nuisance in fact, the determination of which is a question of fact, and the defendant could not operate its business in the manner so properly defined in the instruction without compensating the adjoining owner for the damages actually suffered. *Hardin v. Olympic Portland Cement Co.*..... 320
2. SAME—MEASURE OF DAMAGES. In such a case, when the injury and damage are established, the measure thereof should be that most beneficial to the injured party entitled to enjoy his property intact. *Hardin v. Olympic Portland Cement Co.*..... 320
3. SAME—PERMANENT NUISANCE—PRIVATE INJURY—RELIEF—DAMAGES—RIGHT TO PERMANENT DAMAGES. An adjoining landowner may sue

NUISANCE—CONTINUED.

once for all to recover temporary damages for past injuries to his crops and fruit trees, and for permanent damages to his freehold, suffered through the lawful operation of defendant's cement plant, which threw off fumes and gases and cast particles upon plaintiffs' premises, upon the theory that the same was a permanent nuisance even if it were not a nuisance *per se*, where the defendant intended to maintain the same and could not avoid the injury; since plaintiff in such case has recourse to relief in damages as less onerous and harsh than equitable relief by injunction. *Hardin v. Olympic Portland Cement Co.* 320

4. **SAME—PERMANENT DAMAGES—SCOPE OF RELIEF—JUDGMENT—BAR.** In such a case, the framing of plaintiffs' action precludes any further legal or equitable relief for any injury or damage in the future to respondents' real estate and the enjoyment thereof, by the lawful operation of defendant's plant. *Hardin v. Olympic Portland Cement Co.* 320

5. **SAME—PERMANENT DAMAGES—DEFENSES—INTENT TO DISCONTINUE.** In such a case, defendant cannot assert that the injury is not a permanent one for the reason that the same might be discontinued, where all of the evidence tended to show that the business was more or less permanent and that a substantial plant had been erected with a large amount of materials at hand; since an intention to discontinue and its temporary character could have been the subject of proof. *Hardin v. Olympic Portland Cement Co.*..... 320

6. **SAME—PERMANENT DAMAGES — ACTION TO RECOVER — ISSUES AND TRIAL.** Where, in such a case, on objection to testimony, counsel for plaintiff stated the theory of the action, and that recovery of permanent damages would include any future damages, whereupon defendant withdrew the objection, in order to avoid permanent damages it was incumbent upon the defendant to show that the nuisance would be discontinued; and the plaintiff was estopped to claim any other or additional relief in any other form of action. *Hardin v. Olympic Portland Cement Co.*..... 320

OBJECTIONS:

To evidence, see **CRIMINAL LAW**, 11.

Necessity for purpose of review, see **CRIMINAL LAW**, 13.

To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 12, 14.

To evidence, see **TRIAL**, 3.

Improper objections of counsel at trial, see **TRIAL**, 6.

OBSTRUCTIONS:

Of water course, see **WATERS AND WATER COURSES**, 1.

OFFICERS:

- Sale of stock to officers, see CORPORATIONS, 2, 3.
- Liability to creditors on commencing business before whole of capital is subscribed, see CORPORATIONS, 5.
- County officers, appointment to fill vacancies, see COUNTIES.
- Evidence of transactions with corporate officer since deceased, see WITNESSES, 1, 2.

OPINION EVIDENCE:

- To impeach witness, see WITNESSES, 8.

ORAL CONTRACTS:

- See FRAUDS, STATUTE OF.

ORDERS:

- Review of, see APPEAL AND ERROR, 1-3, 10.
- Review of by certiorari, see CERTIORARI.

ORDINANCES:

- Prescribing boundaries of assessment district, see MUNICIPAL CORPORATIONS, 7.
- Authorizing reassessment, necessity, see MUNICIPAL CORPORATIONS, 11.

OYSTERS:

- Conveyance of oyster lands by state, see NAVIGABLE WATERS, 3-9.

PAROL CONTRACTS:

- See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

- To vary terms of contract, see CONTRACTS, 12.
- In civil actions, see EVIDENCE, 2-7.
- To show breach of warranty, see SALES, 2.

PARTIES:

- See HUSBAND AND WIFE, 1, 7.
- Death ground for abatement, see ABATEMENT AND REVIVAL.
- Entitled to appeal, see APPEAL AND ERROR, 4.
- On motion to strike attorney's lien, see ATTORNEY AND CLIENT, 2.
- Foreclosure of mortgage, see CHATTEL MORTGAGES, 1.
- Engaged in interstate commerce, see COMMERCE.
- Rights and liabilities as to costs, see COSTS.
- Right of codefendants to object to dismissal of joint tort feasons, see DISMISSAL AND NONSUIT.
- Entitled to sue on oral agreement to pay debt of another, see FRAUDS, STATUTE OF, 1.
- Entitled to object to assessment, see MUNICIPAL CORPORATIONS, 12.
- In action by trustee to quiet title, see QUIETING TITLE.

PARTIES—CONTINUED.

1. **PARTIES — PLAINTIFFS — TRUSTEE OF EXPRESS TRUST — QUIETING TITLE.** A trustee of an express trust may maintain an action to quiet title in his own name without joining the *cestui que trust*. *Ritchie v. Trumbull*..... 389

PARTNERSHIP:

Special partnership in real property, see **FRAUDS, STATUTE OF**, 2.

1. **PARTNERSHIP—IN REAL ESTATE—PROFITS—INSTRUCTIONS.** In such a case, it is proper to instruct that, if such an agreement was entered into and the defendant paid the purchase price and expenses and agreed that the profits should be equally divided, the plaintiffs were entitled to one-half the profits, and it was not necessary to instruct as to the existence of the partnership, that being a question for the court upon the admitted facts. *Smith v. Imhoff*..... 418

PASSENGERS:

Carriage of, see **CARRIERS**, 3-6.

PAVEMENT:

Right of abutting owner to refund for, under contract with city for easement for street, see **MUNICIPAL CORPORATIONS**, 2.

PAYMENT:

As constituting equitable assignment of claims, see **ASSIGNMENTS**.

Partial payment as estopping city from asserting set-off or counter-claim in action on building contract, see **CONTRACTS**, 6.

For subscribed stock, see **CORPORATIONS**, 4.

Of license fee as condition precedent to action, see **CORPORATIONS**, 8.

Satisfaction of judgment by assured, as within terms of indemnity policy, see **INSURANCE**, 3, 4.

For easement in street by refund of assessments against property for improvement, see **MUNICIPAL CORPORATIONS**, 3, 4.

Price of goods sold, see **SALES**, 2, 3.

Of price for land as creating resulting trust, see **TRUSTS**.

Application of partial payments on installment note, see **USURY**, 3.

PENALTIES:

Violations of usury laws, see **USURY**, 2.

PENDENCY OF ACTION:

As plea in bar, see **ELECTION OF REMEDIES**.

Effect on limitation of other action, see **LIMITATION OF ACTIONS**, 2.

PERFORMANCE:

Performance or breach of contract, see **CONTRACTS**, 5-12.

PERSONAL INJURIES:

See NEGLIGENCE.

To passenger, see CARRIERS, 3-6.

Damages for, see DAMAGES, 1, 2, 5, 6.

To traveler on highway, see HIGHWAYS.

Contracts by wife with attorney to prosecute action for personal injuries suffered by herself, see HUSBAND AND WIFE, 7.

To employee, see MASTER AND SERVANT.

To person on city street, see MUNICIPAL CORPORATIONS, 16, 17.

To person on or near railroad tracks, see RAILROADS, 6-8.

Caused by operation of street railroad, see STREET RAILROADS.

From city water service, see WATERS AND WATER COURSES, 3.

PHYSICIANS AND SURGEONS:

Right of workman compensated by industrial insurance act to maintain action for malpractice, see MASTER AND SERVANT, 3.

1. **PHYSICIANS AND SURGEONS—PRACTICING WITHOUT CERTIFICATE—INFORMATION.** Under Rem. & Bal. Code, § 8386, making it unlawful to treat the sick without having a certificate authorizing the practice of (1) medicine, (2) osteopathy, or (3) any other system of treating the sick, an information charging the practicing of medicine and the treatment of the sick by the chiropractic method without having a certificate in any form, alleges facts sufficient to constitute the statutory offense, without stating which one of the three certificates provided for by law the accused should have had. *State v. Sanford* 669
2. **SAME.** An information under said section charging the unlawful practice in K. county, without alleging the residence of the accused, is sufficient, even though the statute authorizes the holder of a certificate to record it in the county of his residence and thereupon practice in any other county of the state; since practice in K. county without any certificate constitutes the offense. *State v. Sanford*. 669
3. **SAME—PRACTICE WITHOUT AUTHORITY—INFORMATION—DUPLICITY—SUFFICIENCY.** Although Rem. & Bal. Code, § 8395, makes it an offense to practice medicine without having a certificate recorded in the county in which he is practicing, which must be recorded anew upon any change of residence, and § 8400 makes it an offense to practice without having a certificate, an information is not duplicitous in that it charges the offense of practicing without having the certificate recorded and also the offense of practicing without having a certificate, where it does not state sufficient facts to charge a complete offense of practicing without recording the certificate in the county of his residence; since its allegations in that respect, being insufficient to sustain a conviction, may be rejected as surplusage. *State v. Sanford*..... 669
4. **PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE QUESTION FOR JURY.** In an action for malpractice, the question of

PHYSICIANS AND SURGEONS—CONTINUED.

- negligence in failing to discover a dislocation of the shoulder is a question for the jury, where the testimony as to the making of any of the usual tests was conflicting; experts agreed that failure to do so would be failure to exercise ordinary care and skill, any subsequent injury was denied, and medical witnesses testified that the dislocation found later was of such long standing as to show that it existed when the defendants first treated the plaintiff and failed to discover it. *Hoffman v. Watkins*..... 661
5. PHYSICIANS AND SURGEONS—MALPRACTICE—ISSUES—INSTRUCTIONS. In an action for malpractice in failing to discover a dislocation of the shoulder, where the sole issue was whether the defendant had applied the concededly necessary tests which he claimed to have applied, a requested instruction to the effect that the jury must be governed solely by the testimony of experts skilled in the practice of medicine in determining the question of defendant's lack of due care, is properly refused. *Hoffman v. Watkins*..... 661
6. SAME. In such a case, it is proper to submit such issue with an instruction that the experts agreed as to the proper tests to be made and that the defendant claimed to have made the same, such being the undisputed facts. *Hoffman v. Watkins*..... 661
7. SAME—MALPRACTICE—DAMAGES—EXCESSIVE VERDICT. A verdict for \$4,000 for malpractice in failing to discover and reduce a dislocation of the shoulder is excessive, and should be reduced to \$2,400, where it appears that the dislocation was subsequently reduced and the permanent effects do not materially diminish plaintiff's earning capacity. *Hoffman v. Watkins*..... 661

PLEADING:

- Alleging settlement of damages, see ACCORD AND SATISFACTION.
- In action for accounting, see ACCOUNT.
- Appealability of orders relating to, see APPEAL AND ERROR, 2.
- Amendment on appeal, see APPEAL AND ERROR, 20.
- Election to stand on amended answer as constituting appearance, see APPEARANCE.
- In action to quiet title to property purchased by creditor at execution sale, see FRAUDULENT CONVEYANCES, 1, 2.
- To show deed from husband to wife in fraud of creditors, see FRAUDULENT CONVEYANCES, 3.
- In action for wife's tort in taking and damaging automobile, see HUSBAND AND WIFE, 10.
- Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
- Complaint in action for injunction, see INJUNCTION.
- In action against boom company for loss of logs, see LOGS AND LOGGING, 2.

PLEADING—CONTINUED.

Refusal of leave to file cross-complaint after trial and announcement of judgment, see **TRIAL**, 1.

In action for breach of contract to furnish water for irrigation, see **WATERS AND WATER COURSES**, 5.

1. **PLEADING—CAUSES OF ACTION — REQUIRING ELECTION — DIFFERENT THEORIES.** In an action to quiet title, plaintiff should not be required to elect between a claim of ownership in land through open, notorious, and adverse possession for the statutory period and a claim of ownership based upon the payment of the purchase price although title was taken in the name of another; since there is no inconsistency and both lead to ultimate title resulting in one and the same judgment, and not to a choice of remedies. *O'Donnell v. McCool*..... 537
2. **PLEADINGS—AMENDMENTS—DEPARTURE.** It is not error to refuse to allow an amendment to the complaint at a second trial, to show a breach of the contract not relied upon at the first trial, which introduced a new cause of action and was a departure from plaintiff's theory at the first trial. *Smith Sand & Gravel Co. v. Corbin*... 43
3. **PLEADING—AMENDMENTS—NAME OF DEFENDANT.** Where a complaint against the "Copper King Mining Company" was served on the president of "The Chewelah Copper King Mining Company" and the record clearly showed that it was the intention to sue the latter company, the court properly authorized an amendment of the complaint accordingly. *Freeborn v. Chewelah Copper King Mining Co.* 519
4. **PLEADINGS—ABANDONMENT OF ONE CAUSE—STRIKING.** Where a third cause of action was abandoned at the first trial of the case, it is not error, on a new trial, to strike it out. *Smith Sand & Gravel Co. v. Corbin*..... 43

POLICE POWER:

See **CONSTITUTIONAL LAW**, 1, 2.

Regulation of private contracts of traction company for sale of surplus energy, see **ELECTRICITY**, 3, 4.

Indian treaty as impairing police power of future state, see **INDIANS**, 5-7.

Admeasurement of damages under industrial insurance act as exercise of police power, see **MASTER AND SERVANT**, 4.

POLICY:

Of insurance, see **INSURANCE**.

PONDS:

Places attractive to children, see **NEGLIGENCE**, 2.

POSSESSION:

Character of to establish title, see **ADVERSE POSSESSION**.

POWERS:

- Of court in enforcing attorney's lien, see ATTORNEY AND CLIENT, 1.
- To fill vacancies in office of county board, see COUNTIES.
- Of state to regulate private contracts of traction company for sale of surplus power, see ELECTRICITY.
- Of city to purchase private property for public purpose, see MUNICIPAL CORPORATIONS, 3.
- Of attorney, see PRINCIPAL AND AGENT, 2.
- Of public service commission, see TELEGRAPHS AND TELEPHONES.
- Of court to correct verdict, see TRIAL, 11.

PRACTICE

- See APPEAL AND ERROR; COSTS; CRIMINAL LAW; EVIDENCE; JUDGMENT; NEW TRIAL; PLEADING; TRIAL.
- Of medicine without certificate, see PHYSICIANS AND SURGEONS, 1-3.

PREJUDICE:

- Ground for reversal in civil actions, see APPEAL AND ERROR, 35-41.

PREMEDITATION:

- Premeditated design to effect death, see HOMICIDE, 1.

PREMISES:

- Dangerous premises attractive to children, see NEGLIGENCE, 2.

PRESENTMENT:

- Of claim for injury to live stock, see CARRIERS, 1.
- Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

PRESUMPTIONS:

- As to fraud, see FRAUD, 4.
- As to fraud in transfer of property from husband to wife, see FRAUDULENT CONVEYANCES, 2, 3.
- As to negligence, see NEGLIGENCE, 1.
- Of negligence from failure to fence track, see RAILROADS, 12.

PRICE:

- Reduction of recovery on substantial performance of contract, see CONTRACTS, 9.
- Fair price on sale of property to pay debts of estate, see EXECUTORS AND ADMINISTRATORS, 3.

PRINCIPAL AND AGENT:

- Usurious profits of agent, see USURY, 2.
- 1. PRINCIPAL AND AGENT—RELATION—NEGLIGENCE—ACTS OF AGENTS—AGENCY OR BAILMENT. Where plaintiff allowed a prospective buyer and sales agent, who was indirectly interested in plaintiff's sale, to

PRINCIPAL AND AGENT—CONTINUED.

take plaintiff's automobile for a few days for the purpose of demonstration and teaching the buyer to drive the car, and the car was damaged and the buyer killed while attempting to drive the car under the sales agent's instructions, the sales agent was plaintiff's agent and his negligence, if any, was plaintiff's negligence; and the estate of the deceased buyer is not liable for the loss of the car or the negligence of the buyer as a gratuitous bailee. *Bertrand v. Hunt* 475

2. **PRINCIPAL AND AGENT—POWERS OF AGENT—POWER OF ATTORNEY.** The authority of an agent holding a general power of attorney which was recorded, cannot be limited, as to persons dealing with him without notice, by showing that the property dealt with was after-acquired property, that the agent had been instructed not to acquire it, or to show the circumstances under which the power was executed, as strangers had a right to rely on it. *Auwarter v. Kroll*..... 347
3. **PRINCIPAL AND AGENT—EVIDENCE—DECLARATION OF AGENT—ADMISSIBILITY.** While the fact of agency cannot be proved by the acts and declarations of the alleged agent, the same are admissible, if there is independent evidence of the agency, to show whether an alleged contract was in fact made by the agent, holding himself out as such. *Auwarter v. Kroll*..... 347

PRINCIPAL AND SURETY:

Death as affecting liability of surety, see **ABATEMENT AND REVIVAL**.
 Suretyship of husband as community debt, see **HUSBAND AND WIFE**, 6.
 Federal action to enjoin suits as tolling statute in actions on bond of contractor, see **LIMITATION OF ACTIONS**, 2.

1. **PRINCIPAL AND SURETY—DISCHARGE OF SURETY—DEATH—APPEAL—SUPERSEDEAS BOND.** The death of a surety upon a supersedeas bond does not revoke the contract of suretyship as to costs subsequently arising; since the obligation was one that the surety could not withdraw from upon notice. *Olson v. Seldovia Salmon Co.*..... 547
2. **SAME—REMEDIES OF CREDITOR—DEATH OF SURETY—EXHAUSTION OF PRINCIPAL LIABILITY—APPEAL—SUPERSEDEAS BOND.** Since a surety upon a supersedeas bond is liable upon the bond in the first instance as a principal obligor, the representatives of a deceased surety cannot demand that the obligee first exhaust his remedies against the principal debtor and a living co-surety. *Olson v. Seldovia Salmon Co.* 547

PRIORITIES:

Of mortgages, see **CHATTEL MORTGAGES**, 1.
 Of rights to state shore lands, see **NAVIGABLE WATERS**, 2.

PROBATE:

Finality of order confirming probate sale, see **APPEAL AND ERROR**, 1.

PROBATE COURTS:

See COURTS.

PROCEEDS:

Of insurance policy, exemption from debts, see INSURANCE, 1.

PROCESS:

On appeal, see APPEAL AND ERROR, 7, 8.

PROFITS:

Damages for loss of, see DAMAGES, 3, 4.

Confusion of profits of separate funds with community earnings, see HUSBAND AND WIFE, 2.

Of partnership venture, see PARTNERSHIP.

Usurious profits of agent, see USURY, 2.

PROMISE:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

See CROPS.

Damage to by negligence of adjoining landowner, see ADJOINING LANDOWNERS.

Adverse possession, see ADVERSE POSSESSION.

Subject to garnishment, see GARNISHMENT.

Laws exempting property from taxation, see STATUTES.

PROSTITUTION:

Evidence in prosecution for accepting earnings of prostitute, see CRIMINAL LAW, 2-4.

1. PROSTITUTION—INDICTMENT—SUFFICIENCY—ACCEPTING EARNINGS OF PROSTITUTE. An information charging, in the language of the statute, the accused with wilfully and unlawfully accepting the earnings of one P. W. then and there being a common prostitute, sufficiently charges the offense of accepting the earnings of a prostitute without stating the specific earnings accepted, within the requirements of Rem. & Bal. Code, § 2055, requiring a statement of the acts constituting the offense, in ordinary concise language, so as to enable a person of common understanding to know what was intended. *State v. Schuman*..... 9
2. PROSTITUTION—EVIDENCE—SUFFICIENCY. In a prosecution for accepting the earnings of a prostitute, evidence that the money was paid to defendant, a policeman, solely in consideration of the promise that she be permitted to frequent a certain cafe and solicit without molestation, sufficiently shows that the money was paid to aid,

PROSTITUTION—CONTINUED.

assist or abet the prostitution of the prosecuting witness. *State v. Schuman* 9

3. **SAME—EVIDENCE—SUFFICIENCY.** Evidence that the money was given to the person designated by the defendant sufficiently shows an acceptance by him. *State v. Schuman*..... 9

PROXIMATE CAUSE:

Of injury to passenger struck by street car, see **CARRIERS**, 5.
 Of explosion of boiler, see **MASTER AND SERVANT**, 9.
 Of injury to person in city street, see **MUNICIPAL CORPORATIONS**, 16.
 Of death of stock killed on track, see **RAILROADS**, 11.
 Of injury caused by slipping on wet floor, see **WATERS AND WATER COURSES**, 3.

PUBLICATION:

Of tax sale notice, see **TAXATION**, 2.

PUBLIC IMPROVEMENTS:

By municipalities, see **MUNICIPAL CORPORATIONS**, 1-15.

PUBLIC LANDS:

Adverse possession of, see **ADVERSE POSSESSION**, 2, 3.
 Assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 5, 12-14.
 Tide and shore lands, see **NAVIGABLE WATERS**.

PUBLIC SERVICE COMMISSION:

Power to regulate private contracts of traction company for sale of surplus power, see **ELECTRICITY**.
 Regulation of telephone companies, see **TELEGRAPHS AND TELEPHONES**.

QUESTION FOR JURY:

In action for injury to passenger, see **CARRIERS**, 4, 5.
 In action on contract, see **CONTRACTS**, 7, 8, 10-12.
 In criminal prosecutions, see **CRIMINAL LAW**, 6, 9.
 In action for injury to servant, see **MASTER AND SERVANT**, 7-9, 11.
 Negligence in treatment of patient, see **PHYSICIANS AND SURGEONS**, 4

QUIETING TITLE:

To property purchased at execution sale by judgment creditor, see **FRAUDULENT CONVEYANCES**.
 Parties plaintiff, see **PARTIES**.
 Election between causes of action, see **PLEADING**, 1.

1. **QUIETING TITLE—PARTIES—TRUSTEE OF EXPRESS TRUST—IDENTITY OF CESTUI QUE TRUST.** In an action to quiet title, brought by a trustee of an express trust against parties claiming through his

QUIETING TITLE—CONTINUED.

grantor, the identity of the *cestuis que trustent* is immaterial, as long as the grantor was not the beneficiary of the trust. *Ritchie v. Trumbull* 389

RAILROADS:

Employees engaged in interstate commerce, see COMMERCE.

Parol evidence to limit or restrict absolute grant in right of way deed, see EVIDENCE, 4.

As employers, see MASTER AND SERVANT, 6, 8-15.

In city streets, see STREET RAILROADS.

1. RAILROADS—RIGHT OF WAY DEED—CONSTRUCTION—USE—PURPOSES AUTHORIZED. A right of way agreement and deed for a railroad company's "Bay Side extension" along the water front of a large city, "for railway and similar purposes," through the grantor's mill property, in consideration of certain privileges, the railroad company agreeing to erect a fireproof tunnel, and maintain grade crossings and a switch and free switching service for the sole use of the grantor, being unambiguous and without any reservations or limitations as to the number of trains to be run or the right to extend the branch line to any other point should it be found necessary, will not be construed to limit the company to the use of the way for a branch freight line to serve local industries, for which it was originally constructed, and the grantor cannot object to the company's use of the extension as a part of its main line upon making a necessary change in the main line route, merely because some of the grantor's privileges will be curtailed or destroyed by such extended use of the way; since it was obvious that the "Bay Side extension" was more than a mere side track or industrial spur, and that the growth of the city and location of numerous industries might compel almost continuous use of the branch, and the legal effect of the grant was that the land may be used for such legitimate railroad and public purposes as the future necessities and convenience of the public required, and that the compensation received by the grantor was full indemnity for such uses. *Tacoma Mill Co. v. Northern Pac. R. Co.* 187
2. RAILROADS—RIGHT OF WAY DEED — CONSTRUCTION — ABANDONMENT — LIMITATIONS. Where a right of way deed for an electric railway provided for a forfeiture and reversion in case the railroad should be "abandoned," the next clause, providing that "rights hereby granted shall not determine in any event prior to the expiration of the period of two years," is not a limitation on the grant fixing the time within which the road must be built, but is a limitation on the right to declare a forfeiture, qualifying the preceding clause for the benefit of the grantee. *Oechsli v. Washington Electric R. Co.*... 587
3. SAME—RIGHT OF WAY—DEED—FORFEITURE—ABANDONMENT. Under a right of way deed for an electric railroad, providing for a forfeiture and reversion "if said railroad shall be abandoned," a delay in or

RAILROADS—CONTINUED.

- failure to electrify the road within a reasonable time is not ground for forfeiture of the grant, nor any evidence of an abandonment of the road. *Oechsli v. Washington Electric R. Co.*..... 587
4. SAME. In such a case, the jury could not infer an abandonment of the intention to electrify the road, where it appears that the construction was not completed and that the grantee was setting electric poles and placing copper plates on the rails for the purpose of electrification, and negotiating for electric power. *Oechsli v. Washington Electric R. Co.*..... 587
5. SAME—RIGHT OF WAY DEED—VIOLATION OF TERMS—REMEDY OF GRANTOR—INJUNCTION. Where a public service corporation had constructed a railroad under a right of way deed for an electric road, the grantor's only remedy is for damages, and injunction against operation does not lie, if the company violates the terms of the grant by permanently abandoning the use of electricity for steam, where that was not made a ground of forfeiture in the deed. *Oechsli v. Washington Electric R. Co.*..... 587
6. RAILROADS—LICENSEE ON TRACK—DUTY OF COMPANY. A railroad company owes the duty to a licensee walking upon a track pursuant to an established custom to keep a reasonable lookout in advance, and a reasonable effort to avoid injury after discovering his presence on the track. *Imler v. Northern Pac. R. Co.*..... 527
7. SAME—LICENSEES—DOUBLE TRACK—RUNNING AGAINST TRAFFIC. A railroad company's duty to a licensee upon the track to keep a reasonable lookout and make reasonable effort to avoid injury after discovering his presence does not require the company to run its trains on a double track in the customary direction, and such a licensee may not assume without looking that trains will not be run "against traffic." *Imler v. Northern Pac. R. Co.*..... 527
8. SAME—LICENSEES—NEGLIGENCE—FAILING TO DISCOVER PRESENCE. Where a licensee was not shown to have been walking on the track, and may have stepped from the right of way directly in front of the engine, negligence in failing to discover his presence cannot be imputed to the engineer from the fact that he had an unobstructed view of the track. *Imler v. Northern Pac. R. Co.*..... 527
9. RAILROADS—INJURY TO ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The court cannot find, as a matter of law, that a freight train of sixteen cars, going twenty-eight to thirty miles an hour, could be stopped within a distance of six hundred and fifty feet, especially where all the evidence on the subject was to the effect that the engineer had immediately made every effort to stop the train and could not do so within that distance. *Benn v. Chicago, Milwaukee & St. Paul R. Co.*..... 522
10. SAME—DUTY TO FENCE—STATUTES. A railroad company is not compelled to fence its depot and side tracks at a station outside of

RAILROADS—CONTINUED.

an incorporated city, under Rem. & Bal. Code, §§ 8730, 8731, requiring fencing outside of any incorporated city "and outside the limits of any sidetrack or switch" and requiring cattle guards at highway crossings "and at each end of such sidetrack or switch, outside of any incorporated city." *Benn v. Chicago, Milwaukee & St. Paul R. Co.* 522

11. **SAME—INJURY TO STOCK ON TRACK—FAILURE TO FENCE—PROXIMATE CAUSE.** Where the law does not require the fencing of station grounds or switches outside incorporated cities, the want of a fence is not the proximate cause of the death of stock killed on the tracks within such grounds. *Benn v. Chicago, Milwaukee & St. Paul R. Co.* 522

12. **SAME—INJURY TO STOCK ON TRACK—FAILURE TO FENCE—NEGLIGENCE—PRESUMPTIONS.** Under Rem. & Bal. Code, §§ 8730, 8731, requiring a railroad to fence its tracks and raising a presumption of negligence in the event stock is killed at a point where the track is not fenced, an omission to fence only makes a *prima facie* case of negligence which the company may overcome by evidence. *Benn v. Chicago, Milwaukee & St. Paul R. Co.*..... 522

RATES:

Power to regulate price charged by traction company for surplus power sold to private parties, see **ELECTRICITY**.

Regulation by public service commission, see **TELEGRAPHS AND TELEPHONES**.

RATIFICATION:

Of voidable sale by executor, see **EXECUTORS AND ADMINISTRATORS**, 2.

Of contract by seller, see **SALES**, 1.

REAL ESTATE:

Partnership in, profits, see **PARTNERSHIP**.

REAL ESTATE AGENTS:

See **BROKERS**.

RECEIVING STOLEN GOODS:

1. **RECEIVING STOLEN GOODS—INFORMATION—SUFFICIENCY—"LARCENY"—STATUTES.** Under Rem. & Bal. Code, § 2601, defining larceny where any person, "with intent to deprive or defraud the owner thereof," shall (1) take and drive away the property of another; or (2) shall obtain property by the aid of checks or drafts unlawfully drawn; or (3) withhold or appropriate property held in his possession as bailee, agent, etc.; or (4) withhold or appropriate property received by reason of a mistake; and (5) knowing the same to be "so appropriated" shall receive any property wrongfully appropriated, the

RECEIVING STOLEN GOODS—CONTINUED.

words "so appropriated" applies to the original larceny of property specified in each and all of the preceding four subdivisions. *State v. Ketterman* 264

2. **SAME—INFORMATION—SUFFICIENCY.** In an information for receiving stolen property, it is not necessary to allege the facts going to constitute the original unlawful taking as would be required in a prosecution therefor. *State v. Ketterman*..... 264

RECITALS:

In judgment as to service of summons in tax foreclosure, see **TAXATION, 3.**

RECORDS:

On appeal, see **APPEAL AND ERROR, 10-17.**

REDEMPTION:

From sale on foreclosure of delinquent assessments, see **MUNICIPAL CORPORATIONS, 15.**

REDUCTION:

In recovery of contract price through deviations in performance, see **CONTRACTS, 9.**

REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—FRAUD — EVIDENCE — SUFFICIENCY.** A written contract for the sale of an automobile cannot be reformed for fraud in failing to incorporate in it certain guarantees, upon evidence of the purchaser that he failed to read it when assured that it was only a form, nothing having been done to keep him from doing so, and it appeared by other evidence that he read the whole contract and objected to certain terms; since the fraud must be established by a preponderance of substantial and clear testimony. *Northwest Motor Co. v. Braund*..... 593

REFUND:

Agreement to refund improvement tax in consideration for easement in street, see **MUNICIPAL CORPORATIONS, 1-4.**

REGULATION:

Right to regulate sale by power company of surplus electrical power to private parties, see **ELECTRICITY.**

Of telephone companies by public service commission, see **TELEGRAPHS AND TELEPHONES.**

RELEASE:

See **ACCORD AND SATISFACTION.**

REMOVAL:

Of cloud of outstanding deed on purchase of property by creditor at execution sale, see FRAUDULENT CONVEYANCES, 1.

REOPENING CASE:

See TRIAL, 1, 2.

REPEAL:

Of Indian treaty by act admitting state to Union, see INDIANS, 5.

REPRESENTATION:

Of corporation by officers, see CORPORATIONS, 6.

REPUDIATION:

Of contract of sale by vendor, see SALES, 1.

REPUTATION:

Of accused in criminal prosecution, see CRIMINAL LAW, 3, 4.

REQUESTS:

For instructions, see CRIMINAL LAW, 14.

RESCISSION:

Of contract for exchange of property, see EXCHANGE OF PROPERTY.

Of contract for fraud, see FRAUD, 4.

Laches as bar to action for, see LIMITATION OF ACTIONS, 1.

Of contract for sale of land, see VENDOR AND PURCHASER, 1.

RESERVATION:

Right of Indians to fish outside of, see INDIANS.

RES JUDICATA:

See TRIAL, 1.

RESTRAINT OF TRADE:

Contracts in restraint of trade, see CONTRACTS, 2.

Liability of community on breach of contract by husband not to engage in trade, see HUSBAND AND WIFE, 3, 4.

RESULTING TRUSTS:

See TRUSTS.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 12-16.

REVOCATION:

Of letters testamentary as affecting voidable sale of personalty, see EXECUTORS AND ADMINISTRATORS, 2.

Of liquor license, see INTOXICATING LIQUORS, 2, 3.

RIGHT OF WAY:

Of railroads, see **RAILROADS**, 1-5.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 10.

ROADS:

Streets in cities, see **MUNICIPAL CORPORATIONS**, 1-4, 16, 17.

SALES:

Of corporate stock, see **CORPORATIONS**, 1-3.

Right to regulate sale by power company of surplus electrical power to private parties, see **ELECTRICITY**.

Parol evidence to vary written contract of sale, see **EVIDENCE**, 3.

By personal representatives, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

Fraud in sale of corporate stock, see **FRAUD**, 1, 2.

Execution sale of real property conveyed in fraud of creditor, see **FRAUDULENT CONVEYANCES**, 1.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**, 2.

Of realty, see **VENDOR AND PURCHASER**.

1. **SALES—EXPRESS CONTRACT—TENTATIVE AGREEMENTS—LIABILITY OF BUYER AFTER REPUDIATION BY SELLER.** Where a tentative contract for the sale of goods was entered into with an agent subject to approval, and the seller did not approve but repudiated it and offered a new contract which the buyer rejected, cancelling all outstanding orders, there was no express contract of sale upon which the seller could recover for goods forwarded, and the buyer was not obligated to accept goods ordered on the faith of the tentative contract as a working basis, where the seller repudiated the contract before the arrival of the goods; nor could the seller, after having repudiated the contract, claim a ratification of it by previous orders under it. *Cook v. Story* 109
2. **SALES—WRITTEN WARRANTY—BREACH—PAROL EVIDENCE—ADMISSIBILITY.** In an action to recover the price of "highway paving brick" sold under a written contract at \$17.25 per thousand, the defendant may show by parol, as a partial defense, that the brick furnished was of inferior grade of less value, known as No. 2, and quoted in plaintiff's price list at \$13.75 per thousand. *Peterson v. Denny-Renton Clay & Coal Co.*..... 141
3. **SALES — WARRANTY — BREACH — WAIVER — DAMAGES FOR INFERIOR QUALITY.** Where brick was sold as "highway paving brick" there was an express warranty that the brick to be delivered would be highway paving brick, and the fact that the vendee accepted brick of inferior grade and less value without objection or offering to return

SALES—CONTINUED.

them does not waive the warranty, or prevent him from offsetting his damages, in an action to recover the purchase price. *Peterson v. Denny-Renton Clay & Coal Co.*..... 141

SATISFACTION:

See ACCORD AND SATISFACTION.

SEARCH:

Failure to make diligent search as ground for exclusion of secondary evidence as to contents of letter, see EVIDENCE.

SELF-DEFENSE:

See HOMICIDE, 2.

SEPARATE ESTATE:

Of spouse, see HUSBAND AND WIFE, 2, 3.

SERVICE:

Of summons in tax foreclosure, see TAXATION, 2, 3.

SET-OFF AND COUNTERCLAIM:

Right of equitable assignee to offset payment of claims against action for balance due under contract, see ASSIGNMENTS.

Right to set up in action on building contract, after certificates and partial payments, see CONTRACTS, 6.

In action for price of goods sold, see SALES, 3.

SETTLEMENT:

See ACCORD AND SATISFACTION.

With contractor allowing extra compensation as affecting validity of assessment, see MUNICIPAL CORPORATIONS, 8, 9.

SHIPPING:

Collision of vessels, see COLLISION.

SHORE LANDS:

See NAVIGABLE WATERS, 1, 2.

SIGNATURES:

Of testator, forgery of, see WILLS.

SOVEREIGNTY:

Of Indian tribe and title to land, see INDIANS, 1, 2.

SPECIAL DEPOSITS:

See DEPOSITS.

SPECIAL LAWS:

See STATUTES.

SPECIFIC PERFORMANCE:

1. **SPECIFIC PERFORMANCE—PAROL GIFT OF LAND—EVIDENCE—SUFFICIENCY.** Since an oral contract for the gift of land between relatives must be proved by clear and convincing evidence, specific performance of an agreement by parents to deed land to a daughter, in case the son-in-law would build and occupy a house thereon, is properly denied, where the testimony is unequivocally conflicting as to whether such an agreement was made by the father and was insufficient to connect the mother therewith. *Monroe v. Sams*..... 51
2. **SPECIFIC PERFORMANCE—SALE OF STOCK—REMEDY IN DAMAGES.** Specific performance of a written contract to buy stock and deliver a note in payment will not be granted in the absence of circumstances making a note indispensable; since the action is one for damages, and it is immaterial that the stock was that of a close corporation and of no value if left in the seller's hands. *Templeton v. Warner* 584

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 15-17.

STATES:

Adverse possession against state, see **ADVERSE POSSESSION**, 3.
 Legislative power, see **CONSTITUTIONAL LAW**, 2.
 Right to regulate contracts of traction company for sale of surplus power to private parties, see **ELECTRICITY**.
 Regulation of fishing rights, see **INDIANS**, 4.
 Title to shore lands, see **NAVIGABLE WATERS**, 1.
 Conveyance of tide and shore lands by state, see **NAVIGABLE WATERS**, 2-9.

1. **STATES—PUBLIC WORKS—CONTRACTOR'S BOND—ACTIONS—CONDITION PRECEDENT—NOTICE OF CLAIM.** Under Rem. & Bal. Code, § 1161, providing that no person shall have a right of action upon the bond of a contractor on public work unless he shall present and file the prescribed notice of claim, the notice of claim substantially in the form prescribed is a prerequisite to suit upon the bond of a contractor on state work. *Rodgers v. Fidelity & Deposit Co.*..... 316
2. **SAME—SUFFICIENCY OF NOTICE.** Rem. & Bal. Code, § 1161, requiring notice of claim against the bond of a contractor on public work to be in substance in a prescribed form, stating that he has a claim, "against the bond," designating the amount, the names of principal and sureties, and describing the work, is not substantially complied with by a mere debit statement against the contractor for a balance due for labor and material furnished; since the sureties have a right to know what claims are being made against them by the filing of the required notice. *Rodgers v. Fidelity & Deposit Co.*..... 316

STATUTES:

See RECEIVING STOLEN GOODS.

Death as affecting pendency of action, see ABATEMENT AND REVIVAL.

Liability for destroying or confusing identity of crop liened upon,
see AGRICULTURE.

Relating to abstracts of record on appeal, see APPEAL AND ERROR, 11,
12.

Providing for foreclosure of chattel lien as denial of due process of
law, see CONSTITUTIONAL LAW, 3.

Appointment to fill vacancies in office, see COUNTIES.

Regulation of public service companies, see ELECTRICITY, 4.

Claims against estate of decedent, see EXECUTORS AND ADMINIS-
TRATORS, 1.

Statute of frauds, see FRAUDS, STATUTE OF.

Exemption of proceeds of life insurance from debts, see INSURANCE,
1.

Licensing sale of intoxicating liquor, see INTOXICATING LIQUORS, 1.

Right of trial by jury, see JURY.

Of limitation, see LIMITATION OF ACTIONS.

Duty of boom company to catch and boom logs, see LOGS AND LOG-
GING, 1.

Application of workmen's compensation act, see MASTER AND SERV-
ANT, 1-5.

Federal employers' liability act, see MASTER AND SERVANT, 14, 15, 18.

Assessments for public improvements, see MUNICIPAL CORPORATIONS,
5, 6, 10.

Relating to tide lands, see NAVIGABLE WATERS, 6, 7.

Duty of company to fence track, see RAILROADS, 10, 11.

Foreclosure of delinquency certificate, see TAXATION, 1, 2.

Penalties for usurious profits of agent, see USURY, 2.

1. STATUTES—GENERAL OR SPECIAL LAWS — TAXATION — EXEMPTIONS.
3 Rem. & Bal. Code, § 9098, exempting from taxation all property of
Young Men's Christian Associations which shall be wholly used, or
to the extent solely used, for religious purposes, is special legislation
and in contravention of Const., art. 7, § 2, requiring the legislature
to prescribe by general law such regulations as shall secure a just
valuation for taxation of all property; because it excludes from its
operation the property of other organizations which may be devoted
to religious purposes. *Young Men's Christian Association v. Par-
ish* 495

STAY:

Pending appeal, see APPEAL AND ERROR, 9.

Stay of action as affecting running of statute, see LIMITATION OF
ACTIONS, 2.

STOCK:

Corporate stock, see CORPORATIONS, 1-5.

Fraud in sale of corporate stock, see FRAUD, 1, 2.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 2-5.

STOLEN GOODS:

See RECEIVING STOLEN GOODS.

STREET RAILROADS:

Carriage of passengers, see CARRIERS, 3-6.

1. STREET RAILROADS—COLLISION AT CROSSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Recovery for personal injuries, when plaintiff's automobile was hit by a street car, is sustained, where it appears, that, when plaintiff first attempted to cross the street car tracks ahead of the approaching street car, he had ample room and time to do so before the car reached the crossing, but, as he drove on the track, he was prevented from doing so by another auto truck turning in front of him and, had the motorman been alive to the changed condition, he could have prevented the collision; there being nothing to indicate contributory negligence. *Anderson v. Puget Sound Traction, Light & Power Co.*..... 83

STREETS:

See MUNICIPAL CORPORATIONS, 1-4, 16, 17.

STRIKING:

Motion to strike attorney's lien, see ATTORNEY AND CLIENT, 2.

Review of order denying motion to strike attorney's lien, pending appeal, see CERTIORARI.

Cause of action on new trial, see PLEADING, 4.

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 4, 5.

SUMMONS:

Publication of in foreclosure suit, see TAXATION, 2, 3.

SUPERSEDEAS:

Death as affecting liability of surety on bond, see ABATEMENT AND REVIVAL; APPEAL AND ERROR, 9; PRINCIPAL AND SURETY.

Action against estate of surety on bond, pending appeal, as election of remedy preventing judgment on bond by supreme court, see ELECTION OF REMEDIES.

SURETYSHIP:

See PRINCIPAL AND SURETY.

TAXATION:

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 2.

Refund of improvement tax as consideration for easement for street, see MUNICIPAL CORPORATIONS, 1-4.

Foreclosure of delinquent assessments, notice, see MUNICIPAL CORPORATIONS, 15.

Laws exempting property from taxation, see STATUTES.

1. **TAXATION—CERTIFICATE OF DELINQUENCY—FORECLOSURE—NOTICE—NAME OF OWNER—STATUTES.** Under Rem. & Bal. Code, § 9254, providing for notice of the foreclosure of a certificate of delinquency to the "owner of the property described in the certificate" and Id., § 9257, providing that the name of the person appearing on the tax rolls as the owner shall be considered as the owner of the property, upon the foreclosure of a certificate for the year 1908, when R. appeared on the assessment roll as the owner, he is the only person that need be named in the notice for publication, although the certificate of delinquency did not issue until one year thereafter, at which time M. appeared on the rolls as the owner, the unpaid taxes for 1909 and subsequent years having been paid. *Rockwood v. Turner* 356
2. **SAME — FORECLOSURE — SUMMONS BY PUBLICATION—PROOF—SUFFICIENCY.** Proof of publication of the summons in a tax foreclosure made by the "cashier" of a newspaper is insufficient to confer jurisdiction to enter judgment, in view of Rem. & Bal. Code, § 237, subd. 3, requiring such proof to be made by the affidavit of the "printer, publisher, foreman, principal clerk or business manager of the newspaper." *Rockwood v. Turner*..... 356
3. **TAXATION—FORECLOSURE—JUDGMENT — RECITALS AS TO SERVICE — CONCLUSIVENESS.** A recital in a tax foreclosure judgment of due service of summons is not conclusive and it will not be presumed that due service was made, where the record shows affirmatively that it was based upon a service by publication which was not proven in the manner required by law. *Rockwood v. Turner*..... 356

TELEGRAPHS AND TELEPHONES:

1. **TELEGRAPHS AND TELEPHONES—JOINT RATES — REGULATION — AUTHORITY OF PUBLIC SERVICE COMMISSION.** Where two telephone companies are willing to make a physical connection upon terms agreed upon, the public service commission, in ordering the connection, has no power to provide for the cost. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 625
2. **SAME.** Under the statute authorizing the public service commission to require a physical connection between telephone companies that have failed to establish joint rates when such joint rates should be established, the commission has no power to establish the rates

TELEGRAPHS AND TELEPHONES—CONTINUED.

or tolls until the companies "have failed" to do so after the connection is ordered. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 625

3. SAME. Likewise, the commission in such a case has no authority in the first instance to make rules or regulations to prevent interference between one of such connected companies and a third company, when using the lines of the other connected company; as such interference must be avoided by mechanical means or operating rules put in force by the companies. *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*..... 625

TERMINATION:

Of contract, see **CONTRACTS**, 5.

Of cropping lease, see **LANDLORD AND TENANT**.

TERMS:

Imposition of on granting extension of time for filing statement of facts, see **APPEAL AND ERROR**, 17.

TIDE LANDS:

Title by adverse possession, see **ADVERSE POSSESSION**, 2, 3.

Assessment of for public improvement, see **MUNICIPAL CORPORATIONS**, 5, 12-14.

Conveyances by state, see **NAVIGABLE WATERS**, 3-9.

TIME:

For taking appeal, see **APPEAL AND ERROR**, 6-8.

For filing statement of facts, extension of, see **APPEAL AND ERROR**, 16, 17.

Limitation as to in agreement not to engage in trade, see **CONTRACTS**, 2.

For performance of contract as question for jury, see **CONTRACTS**, 12.

For motion for judgment *non obstante*, see **JUDGMENT**.

For furnishing water called for in deed, see **WATERS AND WATER COURSES**, 4.

TITLE:

Color of title, see **ADVERSE POSSESSION**, 2.

To property conveyed to trustees of corporation, see **CORPORATIONS**, 6.

To unsevered crops on sale of land, see **CROPS**.

To deposit in court, see **DEPOSITS**.

Right and title to soil by prior occupancy, see **INDIANS**, 1, 2.

Of state to shore lands, see **NAVIGABLE WATERS**, 1.

Removal of cloud, see **QUIETING TITLE**.

TOLLING:

Statute of limitations, see **LIMITATION OF ACTIONS**, 2-4.

TORTS:

See ADJOINING LANDOWNERS; FRAUD; NEGLIGENCE; NUISANCE.

Measure of damages, see DAMAGES, 5, 6.

Causing death, see DEATH; HIGHWAYS.

Of wife, liability of community, see HUSBAND AND WIFE, 8-10.

Of employers, see MASTER AND SERVANT.

Of city, see MUNICIPAL CORPORATIONS, 16, 17.

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 15-17.

TREATIES:

With Indian tribe, see INDIANS.

TRIAL:

See NEW TRIAL.

Instructions on issue as to accord and satisfaction of damages, see ACCORD AND SATISFACTION.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 5.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 10-17.

Review of verdicts, see APPEAL AND ERROR, 24, 26.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 35-41.

Instructions in action for broker's commission, see BROKERS.

Instructions in action for injury to passenger, see CARRIERS, 1.

Contributory negligence of passenger as question for jury, see CARRIERS, 5.

Of criminal prosecution, see CRIMINAL LAW.

Instructions as to damages for personal injuries, see DAMAGES, 1, 2.

Instructions in action for death of person struck by automobile, see HIGHWAYS, 2-4.

Right to trial by jury, see JURY.

Instructions in action for injury to servant, see MASTER AND SERVANT, 16, 17.

Instructions in action for damage from nuisance, see NUISANCE, 1.

Instructions as to division of profits of partnership venture, see PARTNERSHIP.

Instructions in action for malpractice, see PHYSICIANS AND SURGEONS, 5, 6.

Impeachment of witness, see WITNESSES, 3, 6-8.

1. TRIAL—OPENING CASE—NEW ISSUES—CROSS-COMPLAINT—DILIGENCE—DISCRETION OF COURT—JUDGMENT—RES JUDICATA. It is not an abuse of discretion in a mortgage foreclosure suit, for the trial court, after trial and announcement of the judgment, to refuse leave to a defendant to file a cross-complaint against a codefendant for the purpose of establishing a liability for the amount of a deficiency judg-

TRIAL—CONTINUED.

- ment upon an alleged assumption of the mortgage; since there was lack of diligence, and the foreclosure decree does not prejudice the right to establish the liability in an independent action. *Painter v. Kennedy* 275
2. TRIAL—REOPENING CASE. It is discretionary to reopen the case for further evidence, after the parties had rested and the court had the case under advisement. *Garey v. Pasco*..... 382
3. TRIAL—OBJECTIONS—WAIVER. Where, to show title, the records of the county auditor's office were offered in evidence showing a deed, and the same was read into the record, without objection other than objection to any description of additional property not in controversy, and appellant waived cross-examination, he thereby waived strict documentary evidence as shown by the deed record. *Rockwood v. Turner*..... 356
4. TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. In an action by a servant for personal injuries, counsel's statement that the defendant discharged the plaintiff shortly after the accident and refused to pay his expenses, is not such misconduct as to warrant a new trial, where the court, on objection, instructed the jury not to consider statements of counsel unless the same were supported by the evidence. *Godley v. Gowen*..... 124
5. TRIAL—MISCONDUCT OF COUNSEL—SHOWING INDEMNITY INSURANCE. In a personal injury case, inquiry of a juror as to whether he had business dealings with any of the defendants, revealing that he was in the liability insurance business and that defendants might be insured, is not misconduct of counsel in placing such fact before the jury, where the information came about naturally in response to lawful inquiry. *Jensen v. Schlenz*..... 268
6. TRIAL—MISCONDUCT OF COUNSEL—IMPROPER OBJECTIONS. An objection to the participation of counsel for a defendant that had been dismissed out of the case is not misconduct of counsel upon which error can be predicated, where it came about through a confusion of ideas and the parties came to a common understanding and "consented" that a judgment of nonsuit be entered. *Jensen v. Schlenz* 268
7. TRIAL—INSTRUCTIONS — PREJUDICE — COMMENT ON FACTS. An instruction that there was no evidence to warrant a finding of fault in the construction of a manhole, is not prejudicial to defendants who were found to have negligently maintained the same; nor would it be an unlawful comment on the facts. *Jensen v. Schlenz*..... 268
8. TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS. An instruction to the jury to the effect that if, under the evidence and these instructions, your verdict is for the plaintiff, your verdict will be for the amounts prayed for in the two causes of action, etc., specifying the amount of each, and if in favor of the defendant, it will be simply

TRIAL—CONTINUED.

- for the defendant, is not misleading in that it prevented separate findings on each cause of action, where the issues had been clearly stated. *Auwater v. Kroll*..... 347
9. TRIAL—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS. An erroneous instruction that a person is a passenger on a street car when he approaches in such a manner that the conductor should ascertain that he intends to board the car is not cured by a subsequent instruction that a person does not become a passenger unless his attempt to board the car is made before the gates are closed; since the inconsistent instructions tend to confuse the jury. *Dunn v. Puget Sound Traction, Light & Power Co*..... 36
10. TRIAL—INSTRUCTIONS—AS A WHOLE. Instructions must be construed as a whole, and not isolated for the purpose of criticism. *Jensen v. Schlensz*..... 268
11. TRIAL—VERDICT—CORRECTION—POWER OF COURT—EMINENT DOMAIN—AWARD. After a verdict is rendered and the jury is discharged, the court is without power to correct the verdict in matters of substance on the ground of inadvertence or mistake; and the correction of a verdict in eminent domain proceedings so as to divest the owners of title to a building which the verdict as rendered permitted them to remove, is a change in substance, reducing the amount of the verdict, which the court cannot make. *In re West Waite Street, Seattle* 688
12. TRIAL—DIRECTION OF VERDICT—QUESTION FOR JURY. A directed verdict or judgment *non obstante* cannot be ordered where there is evidence on behalf of respondent upon an issue of fact determining the liability. *Payzant v. Caudill*..... 250

TROVER AND CONVERSION:

Conversion of mortgaged crop, see CHATTEL MORTGAGES, 2-4.

TRUSTS:

Jurisdiction to authorize conveyance of property held in trust, see COURTS.

Oral agreement as to real estate as creating trust, see FRAUDS, STATUTE OF, 2.

Trustee as party plaintiff in action to quiet title, see PARTIES.

Identity of *cestui que trust*, in action by trustee to quiet title, see QUIETING TITLE.

1. TRUSTS—RESULTING TRUSTS—PAYMENT OF PURCHASE PRICE. A resulting trust from the fact that one party furnished money for the purchase price of land, title to which was taken in another, cannot arise as to the whole title, where the entire purchase price was not so paid by one party. *O'Donnell v. McCool*..... 537

TRUSTS—CONTINUED.

2. SAME—RESULTING TRUST—PAYMENT OF PART OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A resulting trust to an aliquot part of a tract of land arises where it appears that defendant, having paid \$800 for a relinquishment, placed plaintiff and her husband in possession, that they furnished defendant \$840 with which to buy the land, and placed valuable improvements thereon, and that the parties recognized common interests in each other; as there may be a resulting trust in land to a part less than the whole; and it is not unreasonable, after the lapse of time, where there can be no absolute certainty as to the exact proportions each invested, to conclude from the circumstances that the parties intended to invest in equal moieties. *O'Donnell v. McCool*..... 537

USURY:

1. USURY—CONTRACTS—CONSTRUCTION. Upon the question of usury, where a contract is susceptible of two constructions, one lawful and the other unlawful, the former will be adopted. *German Savings, Building & Loan Association v. Leavens*..... 78
2. USURY—"AGENTS" OF LENDER—PENALTIES—PROFITS OF AGENT—LIABILITY—STATUTES. Where plaintiff purchased and accepted a note from brokers which was made payable directly to himself, without ever having dealt with the makers, the brokers are agents of the plaintiff, either by authority or ratification, within the meaning of Rem. & Bal. Code, § 6255, making a lender liable for penalties for usurious profits of an agent, and making any intermediary the lender's agent when he acts for both parties; and hence he is liable for the penalty of the statute where the brokers, in dealing with the makers, deducted usurious commissions. *Edmonds v. Altman*.. 4
3. USURY—CONTRACTS—INSTALLMENT NOTE—PARTIAL PAYMENTS—INTEREST—COMPUTATION. The loan of \$3,377, upon an installment note for \$5,572, to run ten years, and calling for 120 equal monthly payments of \$46.43, is not usurious; since, under the rule for applying partial payments first to the interest then due, and the balance in reduction of the principal, the payments called for amount to \$465.17 less than the sum loaned, with lawful twelve per cent interest thereon, computed monthly in the manner required. *German Savings, Building & Loan Association v. Leavens*..... 78

VACANCY:

In office of county board, see COUNTIES.

VALUE:

Evidence as to value of freight lost in collision of vessels, see COLLISION, 3.

Warranty as to value of stock sold, see CORPORATIONS, 1.

VENDOR AND PURCHASER:

Title to unsevered crops on sale of land, see CROPS.

Sale of premises as termination of cropping lease, see LANDLORD AND TENANT.

Conveyance of mortgaged property, see MORTGAGES.

Purchasers of tide and shore lands, see NAVIGABLE WATERS, 2-9.

Transfer of ownership of personal property, see SALES.

Payment of purchase price as creating trust, see TRUSTS.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—EVIDENCE—SUFFICIENCY.** It is error to deny a rescission of a contract for the exchange of properties, sought by plaintiff upon the ground of misrepresentations as to the character and value of land in Montana, which was subject to claims exceeding its value and therefore worthless, and for which plaintiff gave up property of very considerable value, where it appears that he relied upon false representations that the Montana land was high grade agricultural land with fine soil, capable of producing any kind of grain and particularly adapted to the growth of vegetables for which purposes it was desired, when in fact it was worthless for growing cereals or vegetables of any kind; the contract having been made in this state, several hundred miles from the land, which plaintiff had never seen, although he had been warned by an attorney to first investigate it. *Van Horn v. Chambers* 553
2. **VENDOR AND PURCHASER — BREACH — FORFEITURE — WAIVER.** The settlement of a suit to forfeit a contract for the sale of land for default in the payment of installments, and the acceptance of back payments due at that time, does not waive the vendor's right to insist upon a forfeiture upon a subsequent default, the vendor at all times having insisted upon a compliance with the terms of the contract. *White Investment Co. v. Demarco*..... 34

VENUE:

Criminal prosecutions, see CRIMINAL LAW, 1.

VERDICT:

Review on appeal, see APPEAL AND ERROR, 24-26.

Harmless error in allowance of damages, see APPEAL AND ERROR, 40, 41.

Inadequate or excessive damages, see DAMAGES, 5, 6; DEATH.

Judgment *non obstante*, time for motion, see JUDGMENT.

Excessive damages for malpractice, see PHYSICIANS AND SURGEONS, 7.

Correction by court, see TRIAL, 11.

Direction by court, see TRIAL, 12.

WAIVER:

Error waived in appellate court, see APPEAL AND ERROR, 19.

Lien of mortgage, see CHATTEL MORTGAGES, 3.

Of delay in completing contract, see CONTRACTS, 5.

WAIVER—CONTINUED.

- Of strict performance of contract as question for jury, see **CONTRACTS**, 11.
- Of right by insurer to insist on prepayment of judgment before action on indemnity policy, see **INSURANCE**, 4.
- Of statute of limitations, see **LIMITATION OF ACTIONS**, 4.
- Acceptance of goods as waiver of warranty as to quality, see **SALES**, 3.
- Of objections at trial, see **TRIAL**, 3.
- Of right to forfeit contract for default of vendee, see **VENDOR AND PURCHASER**, 2.

WARNING:

- To servant of dangers, see **MASTER AND SERVANT**, 17.

WARRANTY:

- On sale of corporate stock, see **CORPORATIONS**, 1.
- On sale of goods, see **SALES**, 2, 3.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

1. **WATERS AND WATER COURSES—DAMAGES—OBSTRUCTIONS—EVIDENCE—SUFFICIENCY.** A recovery for obstructing a stream and overflowing plaintiffs' lands is not sustained by the burden of proof, and should be set aside, where the plaintiffs' evidence of an alleged dam caused by defendant's accumulation of debris is very vague, no witnesses actually saw the dam during the overflow at high water, the debris collected after the water went down was not the result of defendant's operations, and defendant's evidence was to the effect that no debris was placed in the water by defendant, or collected to cause the overflow, but that the overflow was the natural result of floods. *Bonthuis v. Great Northern R. Co.*..... 442
2. **WATERS AND WATER COURSES—DIVERSION—INJUNCTION—ESTOPPEL—REMEDY AT LAW.** A landowner who granted a right of way and acquiesced in the construction of a city pipe line across her premises for the purpose of diverting waters for a city water supply cannot, after the completion of the works, maintain an action against the city to enjoin its appropriation of the waters, which were riparian to the land, but will be left to her remedy by action for damages. *Domrese v. Roslyn*..... 106
3. **WATERS AND WATER COURSES—INJURIES FROM WATER SERVICE—DEFECTIVE METER—PROXIMATE CAUSE.** Negligence of a city in installing a defective water meter is not the proximate cause of an injury caused by slipping on a wet floor while attempting to turn the stop valve, when the meter broke and flooded the basement; since the accident could not be reasonably anticipated, and the city is, therefore, not liable therefor. *Ottevaere v. Spokane*..... 681

WATER AND WATER COURSES—CONTINUED.

4. **WATERS AND WATER COURSES—IRRIGATION—CONTRACT TO FURNISH—TIME—REASONABLE TIME.** Where a deed of land, together with a perpetual water right, calls for a supply of water, without fixing the time when the same was to be furnished, the law fixes the time as a reasonable time, considering the facts within the contemplation of the parties at the time the contract was made. *Huschke v. Arcadia Orchards Co.* 423
5. **SAME—CONTRACTS—ACTION FOR DAMAGES—PLEADING — COMPLAINT—SUFFICIENCY.** In an action for damages for breach of contract to supply water called for in a water deed, the complaint states a cause of action in alleging the failure to supply the water and the resulting injury to fruit trees set out, and it is immaterial that plaintiff misconceived the measure of damages, and asked for the difference between the value of the land with and without water upon it, instead of the damage done to the fruit trees. *Huschke v. Arcadia Orchards Co.* 423
6. **SAME—CONTRACTS—BREACH—MEASURE OF DAMAGES.** In an action for damages for failure to supply water called for by a water deed, resulting in injury to fruit trees, the proper measure of damages is the difference between the value of the growing trees had water been furnished and their value without the water, limiting the damages to such injuries as were occasioned by lack of water. *Huschke v. Arcadia Orchards Co.* 423

WILLS:

1. **WILLS—SIGNATURE—FORGERY—EVIDENCE — SUFFICIENCY.** Findings that the signature to the alleged will of an illiterate man was a forgery are sustained, where the experts were of that opinion, and an admitted signature, superimposed upon the challenged signature, was exactly similar, showing that the latter was undoubtedly a tracing from the genuine. *In re Connolly's Estate*..... 168

WITNESSES:

Harmless error in examination of, see **APPEAL AND ERROR**, 36.
In criminal prosecution, see **CRIMINAL LAW**, 3, 6, 9.

1. **WITNESSES—TRANSACTION WITH PERSON SINCE DECEASED—CORPORATION AS PARTY—DECEASED OFFICER.** Rem. & Bal. Code, § 1211, excluding the evidence of a party in interest or to the record in his own behalf as to any transaction had by him with a person since deceased, where the adverse party sues or defends as legal representative of such deceased person, does not exclude evidence of transactions had with a stockholder and officer, since deceased, of a corporation which was the adverse party. *Beaston v. Portland Trust & Savings Bank* 627
2. **SAME—DEPOSITION TAKEN BEFORE DEATH.** A deposition as to transactions with an adverse party who died after the deposition was

WITNESSES—CONTINUED.

taken but before the trial, is not inadmissible as evidence of a transaction had with a party since deceased, within Rem. & Bal. Code, § 1211; since the evidence was competent at the time the witness testified. *Beaston v. Portland Trust & Savings Bank*..... 627

3. WITNESSES—EXAMINATION—RECALLING—DISCRETION. It is not an abuse of discretion to refuse to recall a witness in order to ask an impeaching question as to a purely collateral matter. *State v. Schuman* 9

4. WITNESSES — PRIVILEGE — ACCUSED AS WITNESS — CROSS-EXAMINATION. Where the accused takes the stand in his own defense, he is subject to all the rules of law relating to the cross-examination of other witnesses. *State v. Brooks*..... 427

5. WITNESSES—PRIVILEGE OF ACCUSED—FORMER CONVICTION. It is not an invasion of any constitutional right to ask, on cross-examination, whether the accused had ever suffered conviction before. *State v. Brownlow* 582

6. WITNESSES—CROSS-EXAMINATION—CONCLUSIVENESS—IMPEACHMENT. Where witnesses for the prosecution on cross-examination denied that they were users of cocaine or other drugs, they cannot be impeached by showing that they were, since the matter is collateral. *State v. Schuman*..... 9

7. WITNESSES—CROSS-EXAMINATION — IMPEACHMENT — ADMISSIONS—FOUNDATION. A witness cannot be impeached by showing an admission contrary to the evidence given on cross-examination, where no foundation was laid by directing attention to the time, place, and circumstance of such admission. *State v. Schuman*..... 9

8. SAME — CREDIBILITY — IMPEACHMENT — EXPERT EVIDENCE. Where there was no evidence that witnesses were users of cocaine or other drugs, expert evidence that the use of such drugs would affect their credibility is inadmissible, even if there was a suspicion that they were such users, in the absence of evidence of the mental state or condition either at the time of the transaction or while testifying. *State v. Schuman*..... 9

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT:

See MASTER AND SERVANT, 1-5.

WRITINGS:

Parol evidence to vary writings, see EVIDENCE, 2-7.

WRITS:

See CERTIORARI; INJUNCTION.

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